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IN THE

Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals has authorized the garnishment by a judgment creditor of the Republic of Congo's right to receive its royalty share of oil, which is produced, stored and delivered within the Republic of Congo (the "Congo"). The Fifth Circuit held that the Congo's right to receive royalty oil in Congolese territory is property that is "in the United States" for purposes of the attachment and execution provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(a). This case presents the following question:

Whether a foreign state's right to receive, in its own territory, a royalty share of oil produced by oil companies operating in the foreign state, is property that is located "in the United States" under the FSIA because the oil companies owing the royalty obligation are located in the United States?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit, whose judgment in consolidated Case Nos. 03-50506 and 03-50560 is sought to be reviewed, were as follows:

Petitioner The Republic of Congo was Defendant-Appellee;

Petitioners CMS Nomeco Congo Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. were Garnishees-Appellees;

Respondent Af-Cap, Inc. was Plaintiff-Appellant.

RULE 29.6 STATEMENT

Petitioner CMS Nomeco Congo Inc. is a subsidiary of Perenco Oil and Gas (International) Company, which is privately owned. There is no publicly-held company that owns 10% or more of the stock of CMS Nomeco Congo Inc.

Petitioner The Nuevo Congo Company is a subsidiary of The Congo Holding Company, which is privately owned. There is no publicly-held company that owns 10% or more of the stock of The Nuevo Congo Company.

Petitioner Nuevo Congo Ltd. is a subsidiary of Lankan Inc., which is privately owned. There is no publicly-held company that owns 10% or more of the stock of Nuevo Congo Ltd.

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OPINIONS AND ORDERS BELOW

The opinion of the Fifth Circuit in Case Nos. 03-50506, 03-50560, is reported at *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) and is in the Appendix ("App.") at 1a-22a. The order and judgment of the district court (on remand from the first appeal to the Fifth Circuit in this case), entered on April 7, 2003 in Case Nos. A-01-CA-100-SS and A-01-CA-321-SS, are at App. 23a-50a and are unreported. The Fifth Circuit's decision, in the first appeal in this case (Case No. 01-50409), reported at *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) as amended on rehearing, is at App. 51a-93a. The previous order of the district court, entered on March 16, 2001 in Case No. A-01-CA-100-SS is at App. 94a-104a and is unreported.

Writs of garnishment against Petitioners ordered by the district court in this case and by other courts in Texas, in favor of Respondent and other creditors of the Congo—in *Af-Cap, Inc. v. Republic of Congo*, Case No. A-01-CA-100-SS (W.D. Tex.); *FG Hemisphere Assocs., L.L.C. v. Republique du Congo*, H-02-4261 (S.D. Tex.); and *Nat'l Union Fire Ins. Co. v. People's Republic of Congo*, No. 04-10728 (Dallas County, Tex.)—are at App. 105a-18a and are not reported.

The Fifth Circuit's order on rehearing of its opinion in *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004), Nos. 03-50506, 03-50560, entered on November 1, 2004 and reported at 389 F.3d 503, is at App. 119a-21a.

JURISDICTION

On September 17, 2004, the Fifth Circuit entered its decision reversing the district court's dissolution of writs of garnishment and holding that property of the Congo is

not immune from attachment and execution under the FSIA. On September 30, 2004, Petitioners filed timely petitions for rehearing and for rehearing en banc pursuant to Fed. R. App. P. 40. On November 1, 2004, the Fifth Circuit clarified its decision on rehearing and denied the petition for rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The actions consolidated on appeal to the Fifth Circuit were removed under 28 U.S.C. § 1441(d) to the district court, which had jurisdiction pursuant to 28 U.S.C. § 1330(a).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976, as amended, provides in pertinent part:

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . . [Sub-parts (1) through (7), setting forth the excep-

tions to immunity from attachment or execution under § 1610(a).]

STATEMENT

This petition presents a question of exceptional importance to the conduct of United States' foreign relations, which the lower court's interpretation of the Foreign Sovereign Immunities Act ("FSIA") now jeopardizes: do the immunity exceptions from attachment and execution under § 1610(a) of the FSIA, which are limited to property that is "in the United States," reach a foreign sovereign's property rights in its own natural resources within its own territory?

The court below decided that the FSIA authorizes the extraterritorial enforcement of a creditor's judgment against the sovereign rights of the Congo,[1] under Congolese law, to property consisting of the Congo's natural resources. The Fifth Circuit held that the Congo's right to receive its royalty share of oil, which is produced and delivered in the Congo, is property located "in the United States" because of the United States location—in addition to their locations in the Congo—of the companies obligated to the Congo for the royalty oil. The court's reading of the FSIA thus permits United States courts in private civil litigation to divest a sovereign's ownership and regulation of its natural resources in its own territory if the sovereign grants a concession for the production of its natural resources to a United States company.

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[1] The Republic of Congo, also referred to as "Congo-Brazzaville" and formerly known as the People's Republic of Congo, is not to be confused with the nation currently known as the Democratic Republic of Congo or "Congo-Kinshasa," which was formerly Zaire.

The Fifth Circuit's ruling circumvents the express geographic limitation of the term "in the United States" in § 1610(a), and conflicts with this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which construed the same language in § 1605(a) of the FSIA as limiting its application to United States territory. The Fifth Circuit's contrary interpretation of the same limitation in the FSIA's attachment and execution provisions to property "in the United States" also conflicts with this Court's established rule of statutory construction against needlessly construing a federal statute in a manner that violates international law and infringes a foreign state's sovereignty in its own territory.

Finally, the decision below, by relying on state law to interpret the phrase "in the United States" in the FSIA, subjects a federal statute regulating U.S. foreign relations to the vagaries of state law "situs" rules, in conflict with both this Court's precedent and the rulings of other circuit courts. This Court has made clear that the FSIA preempts state law, and must be interpreted in light of the articulated federal policies underlying the statute and international law. Other circuit courts have expressly rejected the state law rule that the Fifth Circuit adopted in construing § 1610(a) of the FSIA—that "the situs of a debt obligation is the situs of the debtor"—where the situs ascribed to intangible property implicates foreign relations. The Fifth Circuit's ruling, by applying state law to its interpretation of the FSIA undermines the FSIA's purpose of protecting federal interests in sensitive foreign relations matters.

A. Statutory Background

The FSIA is a comprehensive regulatory statute that applies in every action against a foreign state and codifies the modern doctrine of "restrictive" foreign sovereign immunity recognized under international law. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2248-49, 2254 (2004). Under the traditional doctrine of foreign sovereign immunity, a foreign state's immunity from attachment or execution against its property was absolute. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA provides, in § 1609, that a foreign state's property in the United States is presumptively immune from attachment, subject to exceptions under § 1610 and § 1611. Under § 1610(a), the statute provides exceptions to the immunity from attachment of a foreign state's property "in the United States" that is "used for a commercial activity in the United States."

B. Factual And Procedural Background

This case is a garnishment action that was commenced in Texas state court against the Congo and garnishees that included CMS Nomeco Congo Inc., a Delaware corporation ("CMS"), The Nuevo Congo Company, a Delaware corporation, and Nuevo Congo Ltd., a Cayman Islands corporation (collectively, "Garnishees").[2] Garnishees are companies engaged in oil production in the Congo under a Convention with the Congo dated May 25, 1979 ("the Convention"). Garnishees (along with the Congo's state-owned oil company, non-party *Société Nationale des Pétroles du Congo*) are

[2] The facts set out herein are, for the most part, described by the opinion of the district court dated April 7, 2003, which was the subject of Af-Cap's appeal. App. 23a-46a. The Fifth Circuit upheld all of the district court's factual findings. App. 11a. All other relevant facts are supported by undisputed record evidence.

the working-interest owners in a concession (the "Marine I Permit," *see* App. 29a, 148a-49a), granted by the Congolese Government under the Convention.[3]

1. The Congo's Royalty Interest

The Convention governs the oil production operations under the concession and the terms of the Congo's "royalty" under the *Code Général des Impôts du Congo* (the General Tax Code of the Congo). App. 29a, 154a, 158a. A "royalty is the most basic and oldest known petroleum tax." Bernard Taverne, Petroleum, Industry And Governments: An Introduction To Petroleum Regulation, Economics And Government Policies 326 (2001). The royalty is "calculated as a percentage of the value of the oil," which "may be required to be paid in kind"—*i.e.*, by delivery of the royalty share of the oil to the sovereign, a feature of petroleum production regulation that was widely established by international practice at the time the Convention was executed in 1979. *Id.* at 329; Ewell E. Murphy, Jr., *Current Developments In International Petroleum And Mining*, 1981 A.B.A. Sec. Int'l L. 4-5. The Congo takes its royalty interest "in kind," pursuant to its election under the Convention. App. 29a, 34a.

The Convention was executed in the Congo and is governed by Congolese law. The oil is extracted from the submerged seabed adjacent to the Congo's coast, in areas within the Congo's sovereignty and exclusive jurisdiction under Congolese law and international law. *See* App. 29a, 148a, 185a. The oil flows through a subsurface pipeline system to a storage vessel in Congolese coastal waters.

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[3] Garnishees and SNPC are successors-in-interest to the parties that originally entered into the Convention with the Congo in 1979.

When the quantity of stored oil reaches a certain level, the oil is sold and off-loaded from the storage vessel onto an oil tanker chartered by the purchaser. *Id.* at 29a.

Garnishee CMS is the designated "Operator" under the Convention, and must deliver the royalty to the Congo in Congolese territory. No provision in the Convention calls for any performance in the United States by any party, nor provides for the jurisdiction of any court in the United States over a claim arising out of the Convention. Any dispute between Garnishees and the Congo must be resolved by arbitration in Geneva, Switzerland under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes. App. 174a.

2. The Garnishment Proceedings

The garnishment proceedings were originally brought by Af-Cap's predecessor-in-interest, Connecticut Bank of Commerce ("CBC"), in aid of execution of a money judgment against the Congo arising from an unsecured loan the Congo had entered into in 1984, which has been in default since 1986. Respondent Af-Cap acquired the money judgment and substituted itself as plaintiff in 2002.

CBC asserted that Garnishees are indebted to the Congo for the royalty that accrues to the Congo and sought to garnish the "debts" for royalties that Garnishees owed to the Congo, in satisfaction of CBC's unrelated money judgment against the Congo and that such property was garnishable under § 1610(a)(1) of the FSIA.[4] CBC obtained writs of

[4] In the 1984 loan agreement, the Congo waived its immunity from attachment or execution. As a result, § 1610(a)(1) of the FSIA applies, and permits attachment or execution against property of the Congo, which is "in the United States" that is "used for a commercial activity in the United States."

garnishment, originally issued *ex parte* by the state court clerk, purporting to attach the Congo's right to receive its royalty share of oil produced and sold in the Congo under the Convention.

After removal, the Congo and Garnishees moved to dismiss the action on the ground that the FSIA did not authorize the attachment of the Congo's sovereign right to its royalty share of natural resources produced and sold in the Congo. The district court agreed that the Congo's royalty entitlement is "uniquely sovereign in nature" and that the Congo's "control over mineral and natural resources" is "a basic aspect of [its] sovereignty." App. 100a. The district court thus held that the garnishment of Congo's royalty entitlement could not be permitted by an immunity exception from attachment under § 1610(a) and accordingly dismissed the case in March 2001. *Id.* at 101a, 104a. CBC appealed.

3. The Fifth Circuit's First Decision

The Fifth Circuit's decision of CBC's appeal, in August 2002, confirmed that a foreign state's property is not subject to attachment under § 1610(a) of the FSIA unless the property is both "in the United States" and "used for a commercial activity in the United States," even where the foreign state has completely waived its sovereign immunity. App. 53a. The court of appeals held, however, that "[t]he district court (and the litigants) have focused on" the sovereign nature of the petroleum operations that "gave rise to" the Congo's royalty rights, and that "[t]his was the wrong question to consider." *Id.* at 61a. Instead, the district court should have considered the "use" of the royalty

rights because the immunity exception applied only to property "used for a commercial activity in the United States." *Id.* at 64a. The court of appeals vacated the district court's dismissal and remanded with instructions to conduct discovery and decide not what activity gave rise to the royalty obligation, but whether the Congo's royalty oil rights are "used for a commercial activity in the United States" under § 1610(a). *Id.* at 80a. CBC petitioned for rehearing, which the court granted in part and reaffirmed its holdings. App. 67a.

Petitioners cross-petitioned for rehearing and argued that remand to consider the "use" of the Congo's property was unnecessary because the undisputed facts showed that the Congo's royalty entitlement to oil produced in Congolese territory was not "in the United States." Petitioners urged the Fifth Circuit to affirm the dismissal based on the dispositive "situs" limitation under § 1610(a). Since § 1610(a) of the FSIA explicitly limits its application to property "in the United States," the location of the property is a threshold inquiry that must precede determination of how the property is used. Petitioners argued that the situs of the Congo's entitlement under Congolese law to its royalty share of oil in Congolese territory could be resolved on undisputed facts, eliminating the need for judicial intrusion into the Congo's use of its sovereign property that the FSIA was designed to avoid. The court of appeals denied the petition, although it conceded that it "neglected to address explicitly one of the two prongs of analysis under 28 U.S.C. § 1610(a)" by "address[ing] the second of these clauses, but not the first." App. 89a. Nevertheless, it held "this omission does not require any change to the mandate . . . [because] [t]he factual question of what the . . . obligations are 'used for' appears much less difficult on this

record than the legal question of determining the situs of the intangible royalty obligations." *Id.* at 90a.

On remand, after acquiring CBC's money judgment, Respondent took extensive discovery and then moved for permission to execute on the Congo's right to its royalty entitlement that Garnishees owed. The district court denied Respondent's motion, holding that the Congo's use of its property did not satisfy § 1610(a), without addressing the question of whether the property was "in the United States." App. 45a-46a. Respondent appealed to the Fifth Circuit, and Petitioners urged the court to affirm based on the district court's findings, as well as the alternative ground that the situs of the Congo's intangible royalty rights is not "in the United States."

4. The Fifth Circuit's Second Decision

On the second appeal, a quorum of a different panel of the Fifth Circuit reversed the district court's determination that the Congo's property is not "used for a commercial activity in the United States" under § 1610(a) of the FSIA. The court reversed this conclusion because in 1991, to settle a prior debt owed to the National Union Fire Insurance Company ("NUFI"), the Congo assigned to NUFI one-half of the proceeds of each royalty receivable that accrued until the debt to NUFI was paid. App. 11a, 15a-16a. NUFI was never a party to the Convention, but received payments under the settlement until its debt was repaid in August 2002, at which point the assignment to NUFI expired by its terms. The Fifth Circuit upheld the district court's findings of fact, but determined, contrary to the district court, that the 1991 assignment to NUFI rendered

the Congo's royalty rights permanently subject to attachment.

The Fifth Circuit then held that the Congo's intangible right to its royalty share of oil is property of the Congo "in the United States." The court decided that because the Congo's intangible royalty rights were also the "debts" of Garnishees who were located in the United States, the situs of the Congo's intangible property is "in the United States" because "the situs of a debt obligation is the situs of the debtor." App. 18a. The Fifth Circuit therefore held that the Congo's sovereign right to receive its royalty oil is "in the United States" and "used for a commercial activity in the United States," and therefore subject to garnishment under § 1610(a)(1) of the FSIA.

Petitioners filed petitions for rehearing and for rehearing *en banc*. On November 1, 2004, the panel granted the petition for rehearing in a short opinion limited to its error regarding an undisputed issue of fact. App. 120a-21a. On rehearing, the quorum did not address the arguments raised against the quorum's "situs" ruling, and the petition for rehearing *en banc* was denied. *Id.*

After the Fifth Circuit's second decision and the issuance of its mandate on November 1, 2004, writs of garnishment were issued by the district court in this case, and by other courts in Texas, in favor of both Af-Cap and other creditors of the Congo, to attach the Congo's right to royalty oil in Congolese territory, in aid of execution of money judgments for unrelated debts. *See* App. 105a - 18a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S CONSTRUCTION OF THE TERM "IN THE UNITED STATES" CONFLICTS WITH THIS COURT'S PRECEDENTS

A. This Court Has Held That "In The United States" Under The FSIA Means "Within The Territorial Jurisdiction Of The United States"

To determine whether the Congo's right to receive its royalty oil is subject to garnishment under the FSIA as property "in the United States," it is necessary to ascribe a situs to the Congo's intangible property right. The Fifth Circuit adopted a state law "rule ordinarily applied to determine the situs of debtor obligations," and held that "the situs of a debt obligation is the situs of the debtor." App. 18a - 19a. The Congo's royalty rights were therefore ascribed a situs "in the United States" because of the U.S. location of the Congo's "debtors" obligated to the Congo for its royalty oil. *Id.* The court acknowledged that its situs rule is used in ordinary domestic garnishment cases that do not involve the foreign relations context of this case, and "agree[d] that the two contexts implicate different issues and interests." App. 19a-20a. Nevertheless, it saw "nothing about the general rule regarding the situs of debt obligations that would frustrate the purpose of the FSIA, which is to 'limit as much as possible disrupting the 'public acts' or '*jure imperii*' of sovereigns.'" *Id.* at 20a.

The Fifth Circuit's determination of what it means for property to be located "in the United States" conflicts with this Court's interpretation of the same term under § 1605(a)(5) of the FSIA in *Amerada Hess*. In that case, the Court held that the term "in the United States," under the exception to

immunity from suit for torts occurring "in the United States," refers to the geographical area that is "within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441. The Court rejected an interpretation that imputed an extraterritorial scope to the term, holding that the statutory language, which refers to tort claims for damage to property occurring "in the United States," did not evince a legislative intent that the provision apply to injuries occurring outside of U.S. territory. *Id.*

The Fifth Circuit's decision conflicts with *Amerada Hess* because it authorizes the attachment of a foreign state's property that is not "within the territorial jurisdiction of the United States." *C.f. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (Under "the 'normal rule of statutory construction' . . . 'identical words used in different parts of the same act are intended to have the same meaning'" because "every Act of Congress, should not be read as a series of unrelated and isolated provisions") (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The property at issue is the Congo's right to receive its royalty share of oil that is subject to the Congo's sovereignty and exclusive jurisdiction over its natural resources under international law and Congolese law,[5] as well as federal law. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States §§ 511-12, 514-15 (1987) (the economic exploitation of natural resources in a state's coastal waters is subject to the state's

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[5] *See* Ordinance No. 049/77 of 20 December 1977, amending article 2 of Ordinance 26/71 of 18 October 1971, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COG_1971_Ordinance.pdf.

sovereignty and exclusive jurisdiction);[6] *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 480-83 (1981) (confirming exclusive jurisdiction and sovereignty of the United States over the exploitation of and revenues from natural resources from the seabed of its coastal waters). It necessarily follows that the right to receive the royalty is not "within the territorial jurisdiction of the United States," and therefore not "in the United States".

The Fifth Circuit's holding assumes that because the Congo's obligors were located in the United States, the Congo's intangible property rights are "in the United States" under the FSIA. The court's holding necessarily implies that although the Congo's tangible oil is within the territory and exclusive jurisdiction of the Congo, its intangible rights therein can somehow be located "in the United States." But the Congo's sovereignty and exclusive jurisdiction over its natural resources perforce includes its rights and revenues in connection with their economic exploitation. A sovereign state "must have powers of dominion and regulation in the interest of its revenues." *United States v. California*, 332 U.S. 19, 35 (1947). Neither federal law nor international law permits the Fifth Circuit's artificial separation of the Congo's intangible right to its royalty oil from the tangible royalty oil in Congolese territory, purporting thereby to divest the Congo's sovereign right to the latter. *Id.*; *see also United States v. Texas*, 339 U.S. 707, 717, 719 (1950) ("Dominion over navigable waters and property in the soil under them are so identified

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[6] *See* Convention on the Continental Shelf, Apr. 29, 1958, arts. 1-2, 15 U.S.T. 471, 499 U.N.T.S. 311; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982) arts. 56-58, 60, 77-81; *see also* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

with the sovereign power of government that a presumption against their separation from sovereignty must be indulged," and "property interests are so subordinated to the rights of sovereignty as to follow sovereignty.").

The Fifth Circuit's decision failed to follow this Court's precedents and misinterpreted the FSIA in ruling otherwise.

B. The Fifth Circuit's Construction Of The FSIA Contravenes This Court's Precedents Against Construing Federal Statutes So As To Violate International Law

In reliance on the Fifth Circuit's decision and mandate, writs of garnishment were thereafter issued by several courts in Texas in favor of both Af-Cap and other creditors of the Congo to enforce money judgments on unrelated debts against the Congo's rights to its royalty oil in Congolese territory. App. 105a-18a. These extraterritorial enforcement measures, purporting to divest the Congo's sovereign rights to property within its exclusive jurisdiction, are not entitled to legal effect in the Congo. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens. . . ."); *see also The Apollon*, 22 U.S. 362, 370 (1824) (Story, J.) ("The laws of no nation can justly extend beyond its own territories . . . . They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."); Restatement (Third) of Foreign Relations Law of the United States § 206 cmt. b (1987) (a sovereign state has "lawful control over its territory generally to the exclusion of other states").

The American courts' purported exercise of enforcement power in Congolese territory, to which the Fifth Circuit's decision opened the door, violates the fundamental principle of sovereign independence under international law. *See, e.g.*, Restatement (Second) of Foreign Relations Law of the United States § 44 (1965).

By construing the FSIA to permit this result, the decision below also conflicts with this Court's decisions establishing the rule of statutory construction that " 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains,'" to avoid "unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (quoting *Murray v. The Charming Betsy*, 6 U.S. 64 (1804)); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). This rule of construction "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffman-La Roche*, 124 S. Ct. at 2366.

This Court's construction of "in the United States" in *Amerada Hess* establishes that there is "another possible construction" of the FSIA that would be consistent with international law. Thus, the "language of the [FSIA] is readily susceptible of . . . [an] interpretation [that] is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories."

F. Hoffman-La Roche, 124 S. Ct. at 2373 (Scalia, J., concurring). Review should be granted to correct the Fifth Circuit's contravention of this "important component of the legal regime defining the U.S. relationship with international law . . . . [which] is applied regularly by the Supreme Court." Curtis A. Bradley, *The Charming Betsy Canon And Separation Of Powers: Rethinking The Interpretive Role Of International Law*, 86 Geo. L.J. 479, 482-83, 485 (Jan. 1998); Ernest A. Young, *Sorting Out The Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 477-79 (Winter 2002); Ralph G. Steinhardt, *The Role Of International Law As A Canon Of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1161-62 (May 1990).

C. This Court Has Precluded The Application Of State Law To Interpret The FSIA

The decision below ascribes a United States situs to the Congo's intangible property based upon state law principles developed outside of, and without contextual relevance to, the FSIA or any issue of foreign relations. This approach violated the well settled principle that "state law may not be allowed to 'interfer[e] with the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003) (quoting *United States v. Pink*, 315 U.S. 203, 234 (1942) (Frankfurter, J. concurring)) (alteration in original). Foreign relations "must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

Justice Frankfurter specifically criticized the application of a state law situs rule where foreign relations are implicated:

> Legal ideas like other organisms cannot survive severance from their congenial environment. Concepts like 'situs' and 'jurisdiction' . . . summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

United States v. Pink, 315 U.S. 203, 234 (1942) (Frankfurter, J. concurring). Justice Frankfurter emphasized in particular:

> We are dealing with intangible rights, with choses in action . . . . As between the states, due regard for their respective governmental acts is written into the Constitution by the Full Faith and Credit Clause....[which] has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. . . .

Id. at 239-40. Consequently, "no invocation of a local rule governing 'situs' . . . however applicable in an ordinary case," should be permitted to control questions of federal law that implicate national foreign relations. *Id.* at 240. (Frankfurter, J. concurring)

For the same reason, this Court has repeatedly directed that the task of resolving issues arising under the FSIA, as well as other statutes concerning foreign relations, "preclude[s] the application of [state] law," and instead must be "guided by the policies articulated by Congress in

enacting the FSIA" and "necessarily informed both by international law principles and by articulated congressional policies." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621, 622-23, 623 n.10 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("FSIA 'intended to preempt any other State and Federal law . . . for according immunity to foreign sovereigns"); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94, 497 (1983) (the FSIA, "govern[s] foreign sovereign immunity as an aspect of substantive federal law" as to which "the primacy of federal concerns is evident," and "will generally require interpretation of numerous points of federal law."). *See generally Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[In] international disputes implicating . . . our relations with foreign nations . . . . our federal system does not permit the controversy to be resolved under state law" because the "international nature of the controversy makes it inappropriate for state law to control.").

Despite this, the Fifth Circuit applied a state law rule "that the situs of a debt obligation is the situs of the debtor," on the ground that this was "the rule ordinarily applied," and that "[t]his is certainly true in Texas, where this garnishment proceeding commenced." App. 18a-19a. The Fifth Circuit's contradiction of this Court's precedent warrants review for this reason as well.

II. THE FIFTH CIRCUIT'S RELIANCE ON STATE LAW TO DETERMINE THE SITUS OF INTANGIBLE PROPERTY UNDER THE FSIA CREATES A CONFLICT BETWEEN THE CIRCUIT COURTS

Until the decision below, each circuit court considering the situs of intangible property in cases involving a foreign state or implicating international relations has consistently applied federal law standards to determine the intangible property's situs. *See, e.g., Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985). The Court should grant review to resolve the conflict between circuits created by the Fifth Circuit's reliance on state law to determine whether the situs of the Congo's intangible property is in the United States or in a foreign country.

As courts have long recognized,

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.

Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-24 (1931) (Cardozo, J.). Accordingly, courts established a "rule of federal law to determine" the situs of "intangible property [involving] the overriding concern of international relations of the United States." *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968). In cases where the situs determination is imbued with this "overriding national concern," the underlying foreign relations considerations inform the situs determination, rather than "narrow rules developed in other contexts." *Callejo v. Bancomer, S.A.* 764 F.2d 1101,

1122 (5th Cir. 1985). The decision below, however, expressly declined to consider a "different sort of situs calculus" from the state law rule it chose. App. 19a-20a.

Under federal standards established in several circuits, the situs of an intangible debt is with the sovereign that has control over the debt by virtue of its control over property located within its territorial dominion. *See, e.g., Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985); *Tchacosh*, 766 F.2d at 1336-39. The Seventh Circuit expressly rejected the rule adopted by the Fifth Circuit in this case, holding that to determine the situs of the debt based on the situs of the debtor was "a clearly untenable proposition." *F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989) (Posner, J.). If the debtor's location in the United States made the debt's situs "in the United States," "[a] dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm," which would subvert the federal policy to "minimize [judicial] interference with . . . foreign relations." *Id.* The Ninth Circuit in *Tchacosh* also rejected the proposition that "[the] debt ha[d] its situs with the debtor" where "[t]he only connection the relationship between [the debtor and creditor] had to the United States is that [the debtor] is incorporated under United States law, and has a place of business in this country." *Tchacosh*, 766 F.2d at 1336, 1338.

The Fifth Circuit's reliance on state law on the basis that this Court "recognized" the "general operation" of the state law situs rule in *Harris v. Balk*, 198 U.S. 215 (1905) (App. 19a), misapplied that decision to the international

context of the FSIA. *Harris v. Balk* involved "ordinary debts," and the Court expressly stated that ascribing a "situs" to such debts was "unimportant." *Harris v. Balk*, 198 U.S. at 223. *Harris* explicitly acknowledged the domestic context to which its reasoning was limited, premised on the fact that the Garnishor's "judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment." *Id.* at 221. For that reason, determining whether the "situs" of such ordinary debts was in North Carolina or Maryland was "unimportant."[7] By contrast, the Full Faith and Credit Clause does not extend over the territory of a foreign state and does not supersede the Congo's sovereignty. A sovereign has full dominion over its interests in its natural resources, "and is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *United States v. California*, 332 U.S. at 35, 39.

The Court in *Harris* also presumed that the judgment debtor "had the right to sue Harris [the garnishee] in Maryland to recover the debt which Harris owed him." 198 U.S. at 223. Like the Full Faith and Credit Clause rationale, this aspect of *Harris* contrasts sharply with this case because the Congo could *not* sue Garnishees in *any* court in the United States to recover royalties owed to the Congo (even if there were not an exclusive arbitration clause in the Convention). The royalty entitlement under the Convention and the Congo's General Tax Code serves to produce

[7] Indeed, the issue that *Harris v. Balk* primarily addressed was overruled by *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977), in which this Court held that the basis for quasi in rem jurisdiction cannot rest solely on the presence of property of the defendant that is "completely unrelated to the plaintiff's cause of action." *Id.*

public revenues to the government, and the Congo would be prevented from recovering royalties from Garnishees in a United States court by the "revenue rule," "a long established feature of the law of the United States and other nations." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001). Under the revenue rule, courts in the United States (and other nations) will not adjudicate or enforce a claim brought by a foreign state to recover under a revenue law or tax of the foreign state. *See id.; see also Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256-58 (11th Cir. 2003). Relying on *Harris* to determine the situs of the Congo's property under the FSIA, even though the revenue rule renders *Harris*' underlying rationale inapplicable, not only defies common sense, but creates an exception to the revenue rule that would allow a foreign state's creditor to enforce the foreign state's tax laws in American courts, while the foreign state itself cannot.

III. THE IMPORTANCE OF THE QUESTION RAISED IN THIS PETITION WARRANTS REVIEW

A. The Decision Threatens The United States' Relations With The Congo And With Other Foreign States

The decision below authorizes judicial enforcement measures that infringe a foreign state's sovereignty, affronting the foreign state to the detriment of United States foreign relations. An American court's order purporting to divest a foreign state's rights to public assets in its own territory is viewed by the Congo, and would be correctly viewed by other foreign states, as a violation of the foreign state's sovereign independence.

The "strong, positive, and cooperative,"[8] relations between the United States and the Congo, are frustrated by the Fifth Circuit's disregard of the "principle of supreme state sovereignty over natural resources," particularly since "[o]il revenues represent [the Congo's] only significant source of income," and "[c]onsideration of their sovereignty cannot be separated from [the Congo's] near total dependence upon oil."[9] *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC* ("IAM"), 649 F.2d 1354, 1358, 1361 (9th Cir. 1981). The Congo's rights to royalty oil are "'affected with the public interest,'" and is a "'good[] in which only the sovereign may deal.'" *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003) (quoting *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989)); *accord California v. NRG Energy, Inc.*, 391 F.3d 1011 (9th Cir. 2004).

Interference with the Congo's primary public asset necessarily strikes at its most vital economic and sovereign interests. *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997). Relations between the U.S. and the Congo are ill-served by American courts interfering with the Congo's sovereign functions by purporting to deprive the Congo of its "chosen means of allocating and profiting

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[8] Background Note: Republic of the Congo, U.S. Department of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/2825.htm.

[9] "Oil accounts for about 67% of Congo's real gross domestic product (GDP)—about 78% of the government budget—and about 95% of Congo's export earnings . . . ." U.S. Dep't of Energy, *Congo-Brazzaville Country Analysis Brief* 1 (Sept. 7, 2004), http://www.eia.doe.gov/emeu/cabs/congo.pdf.

from its own valuable natural resources." *IAM*, 649 F.2d at 1361.

B. The Decision Would Undermine Important Foreign Policies Of The United States

"[T]he availability of oil . . . [is] a significant factor in international relations." *IAM*, 649 F.2d at 1360 (9th Cir. 1981). The "U.S. Energy Policy With Regard to Africa" identifies the Congo as one of six West African oil-producing nations that will "play[] an increasingly important role in our energy security." [10] The initiative "to promote a more receptive environment for U.S. oil and gas trade, investment and operations" in West African oil producing states demonstrates that relations in this regard "are carefully considered in the formulation of American foreign policy." *Id.* at 1361. The Fifth Circuit's decision impairs this initiative by deeming the Congo's intangible rights to its primary source of public revenue "in the United States" and vulnerable to attachment unless the Congo categorically excludes United States companies from participating in the development of its petroleum resources.

This frustration of United States economic foreign policy resulting from the Fifth Circuit's decision will have widespread impact affecting relations with foreign states worldwide by creating new risks and potential instability with respect to the participation of U.S. investors and businesses in foreign states. United States policy towards

[10] Statement of John R. Brodman, Deputy Assistant Secretary for International Energy Policy, Office of Policy and International Affairs, U.S. Department of Energy, Before the Subcommittee on International Economic Policy, Export and Trade Promotions, Committee on Foreign Relations (Oct. 27, 2003), http://www.usembassy.it/file2003_10/alia/a3102708.htm.

developing states promotes the participation of this country's private sector through private-public partnerships in developing states as a primary means of development.[11] Such partnerships involving United States companies and foreign public entities would be vulnerable to these risks, and unattractive to foreign states whose public revenue receivables owed by United States businesses could be subject to garnishment by American courts. The prospect of being sued as a garnishee and forced into burdensome and expensive litigation would also provide a disincentive for United States businesses to participate in projects with and in the Congo and other developing countries. This case aptly illustrates the risks to which a United States company, operating in foreign territory and under foreign law, is now exposed in the form of garnishment actions by the foreign state's creditors to collect on completely unrelated debts.

Furthermore, the decision below could jeopardize efforts supported by the United States, and by the International Monetary Fund ("IMF") and the World Bank, to restructure the external public debt of the Congo, and other countries. The Congo is one of 38 countries designated by the IMF and World Bank as "Heavily Indebted Poor Countries" ("HIPC"), and is eligible for reduction of its unsustainable debt and poverty relief through an HIPC initiative. The United States supports the HIPC initiative and related multilateral programs "to help clear arrears of post-conflict heavily indebted poor countries" such as the Congo which have experienced major civil conflict in the last 10

[11] *See, e.g.*, U.S. Treasury Secretary John W. Snow, Development Committee Statement for the Record (Oct. 2, 2004), http://www.ustreas.gov/press/releases/js1987.htm.

years, specifically emphasizing that "the Republic of Congo . . . could benefit from such a framework as [it] attempt[s] to normalize relations with official donors and establish economic stability."[12] The United States also has opposed enforcement mechanisms by which creditors "try to extract through litigation concessions from sovereign debtors" instead of "through good faith negotiations."[13] The Fifth Circuit's expansive construction of § 1610(a) multiplies the property of foreign states deemed to be "in the United States," and encourages litigation, rather than voluntary negotiation, to collect from HIPCs. The decision below significantly increases the incentive of secondary market creditors like Af-Cap to purchase distressed public debt at steep discounts, and profit by bringing garnishment actions against United States companies.

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[12] Remarks by John B. Taylor, Under Secretary for International Affairs of the U.S. Treasury, at the Annual Meetings of the African Development Bank (May 25, 2004), http://www.treas.gov/press/releases/js1698.htm.

[13] Statement of Interest of the United States (Sept. 8, 1994), in *CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil*, 886 F. Supp. 1105 (S.D.N.Y. 1995) (No. 94 Civ. 4733) at 17. *See also* Resolving Financial Crises In Emerging Market Economies, Treasury Undersecretary For International Affairs Timothy F. Geithner (Oct. 23, 2000), http://www.treas.gov/press/releases/ls966.htm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 31, 2005

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed September 17, 2004
Charles R. Fulbruge III
No. 03-50506

AF-CAP INC.,
Plaintiff-Appellant,

versus

THE REPUBLIC OF CONGO;
Defendant-Appellee,

CMS OIL AND GAS CO., ET AL.,
Garnishees,

CMS NOMECO CONGO INC.; THE NUEVO CONGO CO.;
NUEVO CONGO LTD.,
Garnishees-Appellees.

No. 03-50560

AF-CAP INC.,
Plaintiff-Appellant,

versus

THE REPUBLIC OF CONGO;
Defendant-Appellee.

Appeals from the United States District Court for the Western District of Texas.

B e f o r e JOLLY and PRADO, *Circuit Judges.*[1]

E. GRADY JOLLY, *Circuit Judge*:

This appeal is the second in this case. The Republic of Congo is attempting to avoid its undisputed debt by claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), notwithstanding that, in the Lending Contract, it pledged as collateral all of its assets and properties, and expressly waived its sovereign immunity. The district court concluded that the Congo was entitled to claim immunity under the provisions of the FSIA because the property at issue was not used for commercial purposes in the United States. We disagree and REVERSE and REMAND.

I

On December 18, 1984, the Republic of Congo entered into a Lending Contract with Equator Bank Limited to provide funds necessary for the construction of a highway in that country. To obtain the loan, the Congo pledged as collateral "all of its assets and properties, wherever located." In the Lending Contract, the Congo expressly waived any right to claim foreign sovereign immunity either from suit or from attachment or execution on its property.

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[1] This matter is decided by a quorum. *See* 28 U.S.C. § 46(d).

The Congo defaulted in 1985. Connecticut Bank of Commerce ("the Bank"), an assignee of the Lending Contract, obtained a default judgment against the Congo in a London, England court. In order to turn this foreign judgment into a United States judgment, the Bank filed suit in a New York state court. The Congo did not appear and the court entered a default judgment in the amount of $13,628,340.11 in favor of the Bank. The New York court also entered an order of attachment, authorizing the Bank to execute against "any assets or other property of the Congo of any nature, irrespective of the use or intended use of such property . . . including any . . . payments or obligations due to the Congo from any oil and gas exploration and development companies. . . ."

On January 11, 2001, the Bank registered the New York judgment in a Texas state court. It then filed garnishment actions there against, *inter alia*, CMS Nomeco Congo, Inc. ("CMS"), Nuevo Congo Company ("Nuevo"), and Nuevo Congo Ltd. (collectively "the Garnishees"). It sought to garnish intangible property purportedly belonging to the Congo, namely, the Garnishees' obligations to pay taxes and royalties to the Congo. The Garnishees are successors-in-interest to a 1979 joint venture (the "Convention") between a state-owned Congolese company, now known as the Societe Nationale des Petroles du Congo ("SNPC"), and several oil companies for oil production in the Congo. Currently, CMS is the operator of the joint venture while Nuevo, Nuevo Congo Ltd. and SNPC possess working interests. Under the terms of the Convention, the Congo permitted the joint venture to extract oil in exchange for the payment of royalties and a variety of taxes related to the Garnishees' activities. The mining royalty can be paid in cash or in kind from the oil lifted from the wells. The

choice regarding the form of payment belongs to the Congo, although it usually elects to have the royalties paid in kind.[2] The Convention also obligates the Garnishees to make periodic tax payments to the Congo based on the net income from covered activities. The remaining profits are split among the Convention members in proportion to their working interests. The Garnishees' obligation to make these tax and royalty payments to the Congo is the property at issue in this case.

Following the Bank's filing of its garnishment action in Texas state court, the Congo and the Garnishees (collectively "the Congo Defendants") removed the case to federal court. There, the Congo Defendants moved for dismissal, arguing that the Congo was entitled to sovereign immunity from the garnishment action under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-

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[2] The Convention specifies a method for how these royalties are to be paid on an in-kind basis. After being produced at offshore wells, the oil flows through a subsurface pipeline system to an offshore storage facility, a retired transport tanker called the "CONKOUATI," which is located in Congolese waters. Once the CONKOUATI is filled with between 550,000 and 600,000 barrels of oil, CMS and Nuevo take a "lifting" and sell the oil. Throughout this process, CMS keeps an over/under accounting of the amount of oil it has lifted and sold, and notes the Congo's royalty entitlement and SNPC's working entitlement under the Convention. CMS and Nuevo continue to take liftings and sell the oil until the combination of the Congo's royalty entitlement and SNPC's working-interest entitlement exceeds 275,000 barrels. At this point, SNPC takes a lifting and sells the oil. In this way, both the Congo's in-kind royalty and tax entitlement and SNPC's working interest are satisfied. Apparently, when SNPC conducts such a lifting, it lifts about 550,000 to 650,000 barrels, at which point it is "over-delivered," which is then accounted for in the over/under accounting described above. SNPC would then not take another lifting until it is under-delivered by 275,000 barrels.

1611. In response, the Bank contended that the Congo had expressly waived sovereign immunity in the Lending Contract. The Bank also argued that the Texas court was bound by the earlier attachment order issued by the New York court.

The district court dismissed the action, rejecting both arguments of the Bank. First, the court rejected the claim that the New York judgment had any preclusive effect on the present case. The court also rejected the Bank's claim that in the Lending Contract, the Congo had waived sovereign immunity even though it was express and in writing; the court held that such a total waiver was ineffective under § 1610(a) of the FSIA, which recognizes only *conditional* waivers. Specifically, the court found that even when a foreign state purports to waive completely its immunity, the FSIA only permits execution on property that is "commercial." The court concluded that the royalty and tax payments to the Congo were non-commercial in nature, and thus the property was immune from attachment under § 1610(a).

The Bank then appealed to this court. We affirmed the district court's holding that the New York attachment order had no preclusive effect. *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 248-51 (5th Cir. 2002). We also agreed that, under the FSIA, a waiver of immunity only applies "against property that meets . . . two statutory criteria," namely, that the property in question be "in the United States" and "used for commercial activity in the United States." *Id.* at 247 (quoting 28 U.S.C. § 1610(a)). We concluded, however, that the district court had erred in applying these statutory criteria by incorrectly focusing on how the property was generated instead of fully considering what it is "used

for."[3] We further clarified this point in an amended opinion issued on rehearing;[4] we remanded the case to the district court with the narrow and specific instructions that it resolve:

> the dispositive factual question: what the royalty and tax obligations are "used for." If it turns out that the royalties and tax obligations are not used for any commercial activity in the United States, the district court should dissolve the writs of garnishment and dismiss the action.

Id. at 260-61.

On remand, the district court ordered discovery to determine whether the tax and royalty obligations were property "used for" commercial activity in the United States. Af-Cap, Inc., who had succeeded the Bank in interest during the pendency of the Bank's appeal, vigorously pursued that discovery, receiving thousands of pages of responsive documents and deposing numerous witnesses from the Congo, the Garnishees and non-parties.

After hearing arguments, the district court held that the Congo did not use its tax and royalty obligations for commercial activities.[5] Accordingly, it held that this property

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[3] Specifically, we held that the district court erroneously had focused its primary attention on whether the source of the royalties and tax obligations—in this case, the joint venture—was a commercial activity. Instead, the district court should have focused on the use of the property itself: "The amenability of these royalties and taxes to garnishment depends on what they are 'used for', not on how they were raised." *Connecticut Bank*, 309 F.3d at 251.

[4] The amended opinion contained a more detailed discussion of the application of the "used for" criterion under the FSIA.

[5] Because the district court found that the property at issue did not satisfy the "used for" prong of § 1610(a), the district court declined

was not within an exception to immunity and dismissed the garnishment action. Af-Cap has appealed.

In this appeal, Af-Cap makes two arguments. First, it contends that the district court erred in disregarding the Congo's express waiver of immunity contained in the Lending Contract. Second, it asserts that the district court erroneously concluded that the royalty and tax payments were not used for commercial activity.

II

We first consider Af-Cap's argument that the district court erred in failing to enforce the explicit waiver of sovereign immunity in the Lending Contract. This argument, however, has already been made and rejected in the earlier appeal. In the first appeal, Af-Cap's predecessor cited the same language in the Lending Contract, arguing that it permitted execution against "any property whatsoever," "irrespective of its use or intended use." It argued that even if this violated the express restrictions under the FSIA, these restrictions were inapplicable because (1) the Congo signed a contractual waiver in the Lending Contract and (2) the New York court's order should be given preclusive effect. Although most of our opinion in the earlier appeal focused on rejecting the latter of these claims, we explicitly rejected the former claim as well. We noted:

> The Foreign Sovereign Immunities Act provides foreign sovereigns with immunity from execution against their property to satisfy an adverse judgment. This statutory immunity is subject to

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to address whether the "situs of the obligations" is "in the United States," the second statutory criterion under § 1610(a).

> several exceptions. One exception is that, if a foreign sovereign waives its immunity from execution, U.S. courts may execute against "property in the United States . . . used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(1). *Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria.*

Connecticut Bank, 309 F.3d at 247 (internal citations removed and emphasis added).

Our mandate on remand also showed that we had rejected this argument. We gave narrow and specific instructions to the district court, directing it to decide the "dispositive factual question" of whether the Congo's property is "used for any commercial activities in the United States," and to dismiss the action if it was not. *Id.* at 260-61.

Af-Cap contends that this interpretation of the FSIA is incorrect and that the FSIA does in fact permit a complete waiver of sovereign immunity. Whatever the validity of that claim, however, we are obligated to accept the ruling of the earlier panel. "On second appeal following remand, the only issue for consideration is whether the court below reached its final decree in pursuance of [this court's] previous mandate." *Burroughs v. FFP Operating Partners, L.P.*, 70 F.3d 31, 33 (5th Cir. 1995). Thus, "this Court will not reconsider issues decided by the prior panel." *Id.* Under the law of the case doctrine, "an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *St. Paul Mercury Ins. Co. v. Williamson*, 332 F.3d 304, 309 (5th Cir. 2003). Accordingly, the only question properly before this panel on this second appeal

is "whether the court below reached its final decree in pursuance of [this court's] previous mandate." *Burroughs*, 70 F.3d at 33.[6] That is, our present authority is limited to examining whether the district court correctly determined that the tax and royalty obligations at issue here are not used for commercial purposes in the United States. We now turn to this question.

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[6] Af-Cap correctly points out that the law of the case is a discretionary, not jurisdictional, doctrine and can be ignored if a prior holding is "clearly erroneous and would work a manifest injustice." However, as evidenced by the cases Af-Cap cites in support of this proposition, courts rarely invoke this exception to the law of the case doctrine and when they do, it is because of post-decision changes in evidentiary facts or in the applicable law and *not* because the subsequent panel disagreed with the earlier panel's legal conclusions. *See Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (refusing to reexamine previous factual findings despite an alleged change in factual circumstances); *Tollett v. City of Kemah*, 285 F.3d 357, 365-66 (5th Cir. 2002) (refusing to reexamine an earlier panel's conclusion following the submission of allegedly new evidence at a district court's hearing on remand); *U.S. v. Matthews*, 312 F.3d 652, 657-58 (5th Cir. 2002) (agreeing to reexamine original panel's legal conclusions where those legal conclusions had been called into question by a subsequent Supreme Court decision).

Notably, Af-Cap cites no cases where a subsequent panel reversed a prior panel's legal conclusion solely because the subsequent panel disagreed with it. The absence of such cases should not be surprising. The subsequent panel would not only have to forego application of the law of the case doctrine, but would also have to discard the well-established rule that circuit panels are "bound by the precedent of previous panels absent an intervening . . . case explicitly or implicitly overruling that prior precedent." *U.S. v. Short*, 181 F.3d 620, 624 (5th Cir. 1999).

III

A

As discussed previously, in our earlier opinion following the first appeal in this case, this court held that under § 1610(a) of the FSIA, a court is prohibited from executing against the property of a foreign state unless that property is: (1) in the United States; and (2) used for commercial activity in the United States. *Connecticut Bank*, 309 F.3d at 247. We first turn to an analysis of the district court's determination that these tax and royalty obligations were not used for commercial purposes in the United States.

Before doing so, we must first make clear the applicable standard of review in this case. Determining whether property is used for commercial purposes requires a court to both make factual findings concerning how the property was used and to reach legal conclusions concerning whether that particular use was "for commercial purposes." When a district court's decision involves such mixed questions of law and fact, we review the district court's factual findings for clear error, and its legal conclusions and application of law to fact *de novo*. *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 424 (5th Cir. 2002).

We find no clear error in the district court's material factual findings concerning the Congo's past use of these royalty obligations. The district court found, and the Congo concedes, that it has, in the past, utilized these tax and royalty obligations for an explicitly commercial purpose. In 1989, the National Union Fire Insurance Company ("NUFI") obtained a judgment against the Congo after the Congo defaulted on a $26,425,000 loan. Two years later, in 1991, NUFI sued the Congo in federal court in an effort to collect its judgment by garnishing the same tax and royalty

obligations that are at issue in this case. NUFI and the Congo eventually entered into a settlement agreement under which the Congo assigned NUFI fifty percent of these tax and royalty obligations until such a time as the underlying debt was fully paid. Significantly, this money was paid by the Garnishees directly to NUFI; the Garnishees would then pay the remaining amount of royalties due to the Congo. This arrangement went on for over eleven years—until August 2002—until the multi-million dollar debt was paid. The Congo has also acknowledged that, although these tax and royalty obligations were actually used in this fashion only once, the Congo seriously contemplated using these obligations in a similar manner on at least one other occasion. Around the time the NUFI settlement was set to expire, the Congo entered into settlement discussions with another creditor wherein a similar assignment of debt was proposed, albeit ultimately not adopted.

Because we find no clear error in the district court's material factual findings, the question before this court is a strictly legal one: whether such past commercial use is sufficient to render these obligations "property used for commercial purposes" for purposes of the FSIA. The Congo Defendants argue that it is not. They contend that "an exceptional and singular" past commercial use at one point in time is insufficient to establish that this specific property is used for commercial purposes under the FSIA. Instead, they contend that the FSIA warrants a more comprehensive approach to the question of commercial use, focusing not on isolated and unusual uses, but instead on what the property is "essentially used for."

The district court agreed that the Congo Defendants' recommended approach was consistent with the legislative

purpose of the FSIA. The court noted that there was little case law delineating precisely how a court should analyze property to determine whether it was being used for commercial purposes under the FSIA, but reasoned that evidence of a single commercial use in the past could not, by itself, render the property in question now and forever subject to garnishment. Instead, the district court applied a form of the Congo Defendants' recommended "essential use" test, focusing on determining the predominant or essential use of the property in question. Concluding that the "single instance" of tax and royalty obligations being used to satisfy a commercial debt was not enough to render the property essentially commercial in nature, the district court dismissed the action.

We have no major disagreement with the analytical approach that the able district court adopted in determining whether these tax and royalty obligations were commercial in nature. Like the district court, we have similar reservations about defining property use as commercial in nature solely by reference to past single and/or exceptional commercial uses. Instead, we agree that determining the commercial (or non-commercial) status of a property's use requires a more holistic approach. Specifically, we think that an analysis applied to such a question should examine the totality of the circumstances surrounding the property. This analysis should include an examination of the uses of the property in the past[7] as well as all facts related to its

[7] We disagree with the district court's alternative holding that evidence of past commercial use cannot be considered for purposes of establishing the commercial or non-commercial nature of property under the FSIA. According to the court, § 1610(a) only applies to "present and impending uses." Instead, we think that the consideration of evidence of past use is an indispensable part of a court's FSIA inquiry. A court forbidden to consider how property has been used in

present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is "an out of character" use for that particular property.[8]

This holistic approach is also consistent with the reasoning in our earlier decision in this case. There, Af-Cap's predecessor argued that courts should look at the source as opposed to the use of the property to determine its commercial nature. In rejecting this contention, we utilized the following analogy:

> Consider an airplane owned by a foreign government and used solely to shuttle a foreign head-of-state back and forth for official visits. If the plane lands in the United States, it would not be subject to attachment or execution. The plane is not "used for" any commercial activity, in the U.S. or elsewhere. It plainly would not matter how the foreign government bought the plane, raised the purchase price, or otherwise came into ownership. Even if the government received the plane as payment from a U.S. company in an obviously commercial transaction, that would not somehow transform the "use" of the plane into a commercial use. Regardless of how the government came to own the plane, a U.S. court could never under the terms of the FSIA confiscate a

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the past would be hard-pressed to accurately determine whether the predominant use of that property is commercial or sovereign.

[8] In this analysis, we also think it would be appropriate for a court to consider whether the use of the property in question was being manipulated by a sovereign nation to avoid being subject to garnishment under the FSIA.

> plane used solely to transport a foreign head-of-state on official business. Attaching the plane and selling it in execution of a judgment would go too far in interrupting the public acts of a foreign state.

Connecticut Bank, 309 F.3d at 253.

Tweaking this analogy a bit, consider that the airplane had been used on rare occasions for commercial activities—for example, it was temporarily used to fill in for a disabled plane in the foreign country's commercial fleet. It would strain reason to conclude that these limited, emergency usages rendered the plane subject to garnishment now and forever irrespective of the fact that its use was otherwise almost exclusively non-commercial. Indeed, permitting the attachment and selling of such a plane in execution of a judgment would also "go too far in interrupting the public acts of a foreign state." Thus, we conclude that under the FSIA, foreign property retains its immunity protection where its commercial uses, considered holistically and in context, are bona fide exceptions to its otherwise noncommercial use.[9]

That said, although we are fairly in agreement with the form of the analysis applied by the district court, and dis-

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[9] This conclusion also squares with the logic of a case quoted approvingly by this court in its earlier decision in this case. In *Eastern Timber Corp. v. Republic of Liberia*, 659 F.Supp. 606 (D.D.C. 1987), the property at issue was a Liberian bank account primarily used to fund diplomatic and consular activities, though some portion of the account had been used for commercial activities. The *Eastern Timber* court, however, determined that the account was still immune from execution, explaining that it "decline[d] to order that if any portion of a bank account is used for commercial activity, then the entire account loses its immunity." *Id.* at 610.

pute none of its underlying fact determinations, we disagree with its legal conclusion that these tax and royalty obligations were not used for commercial purposes. Instead, we think that the facts relating to the past and present use of these obligations, examined broadly and in context, establish the opposite.

As the facts of the NUFI settlement indicate, for nearly half of the twenty-four years that these obligations existed, the Congo has used at least fifty percent of them to repay a commercial debt. The amount of the debt repaid was not insignificant; during the course of this extended period of time, over $26,000,000 was diverted from these obligations to the Congo's commercial creditor. Such a continuing, extended and monetarily significant use is neither exceptional nor *de minimis*. Moreover, it is difficult to say that execution on this obligation would be so unusual that it would shock and disrupt the public affairs of the Congo.[10]

Indeed, on at least one other occasion, the Congo contemplated engaging in the same type of use again. Although such contemplated use is not actual use,[11] it is strongly

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[10] In support of their contention that the use here was exceptional, the Congo Defendants rely heavily on the district court's legal characterization of this use as "single." While rhetorically powerful, this characterization is somewhat misleading. Indeed, this use is "singular" only in that it was used to satisfy a single debt. In its other aspects, the use was frequent, ongoing, and longstanding.

[11] The Congo Defendants contend that in *Connecticut Bank*, this court held that merely "contemplated" commercial uses are not relevant factors in a court's determination of whether property was used for commercial purposes for purposes of the FSIA. This, however, is a mischaracterization of our holding in that case. Our discussion of "contemplated" use in *Connecticut Bank* occurred not in the context of determining which *types* of uses are properly considered in an FSIA commercial use analysis, but instead in the context of rejecting the argument that property that is "generated by" or "contemplated

suggestive that the proceeds of these tax and royalty obligations were not cordoned off for use of the Congo in its sovereign capacity. Instead, it indicates the availability of this property for whatever purpose—commercial or otherwise—the Congo deems appropriate. Such property seems hardly the type of foreign property the FSIA was designed as a shield to protect, i.e., funds so central to a nation's operations as a sovereign that uses thereof would "interrupt[ ] the public acts of [this] foreign state." *Id.* at 253. Accordingly, we conclude that these tax and royalty obligations are used for commercial purposes for purposes of § 1610(a) of the FSIA.

B

We now turn to the question of the situs of these tax and royalty obligations. As noted previously, for foreign property to be stripped of its immunity under the FSIA, § 1610(a) not only requires that the property in question be used for commercial purposes, but also that the property be "in the United States." *Id.* at 247.[12]

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by" commercial activities is also used for commercial purposes under § 1610(a). *See Connecticut Bank*, 309 F.3d at 258-60. We said nothing in *Connecticut Bank* about the appropriateness or inappropriateness of a court examining evidence of the contemplated uses of particular property as part of its inquiry into whether the property is used for commercial purposes. Indeed, we think that, as here, examining evidence of contemplated commercial use would greatly aid a court in making a determination of the general commercial or non-commercial nature of particular property.

[12] Even though the district court did not address the question of situs, we need not remand because the question here is one of law based on a fully developed record in which there are no material factual disputes.

Determining the situs of the property at issue here poses a special problem because this property is intangible in nature. This court and others have noted the inherent difficulty of assigning a location to property that by its very definition "lacks a physical existence." *See* BLACK'S LAW DICTIONARY 1233 (7th ed. 1999). The Third Circuit has observed that attaching a situs to intangible property is necessarily a legal fiction; therefore, the selection of a situs for intangibles must be context-specific, embodying a "common sense appraisal of the requirements of justice and convenience in particular conditions." *U.S. Industries, Inc. v. Gregg*, 540 F.2d 142, 151 n.5 (3rd Cir. 1976) (citations and quotations removed). This court has also recognized the context-specific nature of an inquiry into the situs of intangible property. In *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir. 1968), after noting that "[t]he situs of intangible property is about as intangible a concept as is known to the law," we affirmed that the situs of intangible property will vary, depending on the context. Thus:

> The situs may be in one place for ad valorem tax purposes, . . .; it may be in another place for venue purposes, i.e., garnishment . . .; it may be in more than one place for tax purposes in certain circumstances . . .; it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the application of the Act of State Doctrine is involved.

Id. at 714-15 (citations omitted).

We think a "common sense appraisal of the requirements of justice and convenience" in this particular context yields the conclusion that the situs of these royalty obligations is the United States—the situs of the Garnishees. This conclusion is consistent with the application of the rule ordinarily applied to determine the situs of debtor obligations like these tax and royalty obligations. Specifically, courts consistently hold that the situs of a debt obligation is the situs of the debtor.[13] This is certainly true in

[13] The Congo Defendants attempt to avoid the conclusion that these tax and royalty obligations are debt obligations by attempting to fix a physical location to them. Specifically, they point to the fact that the Convention permits the Congo to elect how these royalties will be paid and the Congo always elects to have them paid in kind. *See* n.1 *infra*. They thus essentially contend that the property at issue here is actually the oil stored in a tanker in Congolese waters. Because this oil is located in the Congo, they argue that the Congo is the situs of these tax and royalty obligations. This contention is flawed for two principal reasons. First, it cannot be squared with the facts surrounding the use of these tax and royalty obligations; as we have previously noted, under the NUFI settlement, for nearly half of the Convention's existence, at least half of these obligations were diverted in the form of cash payments to the Congo's creditor. Notably, this diversion did not involve the Congo drawing oil from the tanker, selling it, and then paying fifty percent of the proceeds directly to the creditor; instead, these debt payments passed directly from the Garnishees, who resided in the United States, to the NUFI creditor, which also resided in the United States. This fact alone seems sufficient to defeat the Congo Defendants' argument that these obligations are somehow physically located in the Congo. However, the Congo Defendants' implicit suggestion that the tax and royalty obligations that Af-Cap is seeking to garnish have a physical location is itself fatally flawed. Here, Af-Cap is not seeking to attach any of the Congo's physical property (like its oil) but instead it seeks to attach the *obligations* to pay royalties owed by the Garnishees. As noted previously, such debtor obligations are intangible assets, which by definition have no physical existence. For these reasons, the Congo Defendants' attempt to essentially ascribe a physical existence to them fails.

Texas, where this garnishment proceeding commenced. *See, e.g., Mo., Kan. & Tex. Ry. Co. of Tex. v. Swartz*, 53 Tex.Civ.App. 389, 392, 115 S.W. 275, 276 (1908, no writ) (holding that the situs of a debt obligation is the situs of the debtor). This same rule is also applied in other states. *See, e.g., Alliance Bond Fund v. Grupo Mexicano De Desarrollo*, 190 F.3d 16, 25 n.9 (2d Cir. 1999) (recognizing this rule generally applies under New York law); *Great Falls Transfer & Storage Co. v. Pan Am. Petroleum Corp.*, 353 F.2d 348, 349 (10th Cir. 1965) (recognizing the same under the laws of Montana and Wyoming). Furthermore, this rule's general operation has been recognized by the Supreme Court. *See, e.g., Harris v. Balk*, 198 U.S. 215, 221-22, 25 S.Ct. 625, 49 L.Ed. 1023 (1905).

We acknowledge that in these foregoing cases, the courts were determining situs for the purpose of establishing jurisdiction over property subject to a garnishment action, whereas in this case we are considering situs for purposes of determining immunity under the FSIA. The Congo Defendants seize on this distinction, arguing that a different sort of situs calculus should apply in the FSIA context as questions that purely concern jurisdiction do not implicate delicate issues concerning the availability of foreign sovereign immunity and comity between nations.[14]

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[14] The Congo Defendants also argue that the act of state doctrine should apply; this means that the situs of foreign debt obligations must be the foreign country because a contrary conclusion would improperly "antagonize the foreign government." However, the act of state doctrine is inapplicable in this context. As the Supreme Court, and this court, have made clear, the act of state doctrine applies only when the dispute implicates the legitimacy of public acts undertaken by a sovereign nation. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (holding that the act of state doctrine prevented the court from reaching the merits of a dispute

While we agree that the two contexts implicate different issues and interests, we think that these differences are immaterial for present purposes, as we see nothing about the general rule regarding the situs of debt obligations that would frustrate the purpose of the FSIA, which is to "limit as much as possible disrupting the 'public acts' or 'jure imperii' of sovereigns." *Connecticut Bank*, 309 F.3d at 253. Specifically, we fail to see how permitting Af-Cap to execute against intangible commercial debt obligations owed by business entities formed and headquartered in the United States "interrupts [the Congo's] public acts," particularly when the Congo has proven more than willing to divert these obligations directly to its commercial creditors in the United States. *Id.* Indeed, in an earlier case, we rejected the notion that enforcing general rules (like the rule establishing the situs of debtor obligations here) against the commercial activities of foreign nations would inappropriately interfere with their sovereignty. We stated:

> In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citi-

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over sugar cane seized pursuant to the Cuban government's decision to nationalize the sugar industry); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112-24 (5th Cir. 1985) (invoking the doctrine in refusing to intervene in a dispute implicating the legitimacy of Mexico's promulgation of exchange control regulations). Because this case does not involve such a public act, but rather a mere dispute over the payment of a debt the Congo does not dispute that it owes, the act of state doctrine does not apply.

> zens is unlikely to touch very sharply on "national nerves."

De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976)).

Finally, the interests for which the Congo urges protection from "interruption" are in fact protected by the FSIA itself—if the property is used for sovereign purposes and not for commercial use, then there can be no action for garnishment in the United States.

Seeing no conflict between the application of this ordinary situs rule and the purposes and goals of the FSIA, we conclude that this same rule should apply in this context relating to property used commercially. Accordingly, we hold that the situs of these tax and royalty obligations is the United States.[15]

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[15] The Congo Defendants cite two district court cases from other circuits in support of their claim that a different type of situs calculus should apply in the present context. *See Raccoon Recovery LLC v. Navoi Mining & Metallurgical Kombinat*, 244 F.Supp.2d 1130 (D.Colo. 2002); *Fidelity Partners, Inc. v. Philippine Exp. & Foreign Loan Guarantee Corp.*, 921 F.Supp. 1113 (S.D.N.Y. 1996). Aside from the fact that neither case is binding on us, both are distinguishable as neither involved debt obligations, but rather other forms of intangible property. In *Raccoon Recovery*, a judgment creditor sought to execute upon a judgment debtor's partnership interest in an Uzbekistan mining operation under a Colorado law allowing it to do so. 244 F.Supp.2d at 1142. In *Fidelity*, the property at issue was a foreign state's bank deposits maintained and controlled exclusively at a bank headquartered in that foreign country. 921 F.Supp. at 1119.

IV

To sum up: We hold that the district court correctly applied the law of the case doctrine to reject Af-Cap's argument that the Congo waived fully its claim of sovereign immunity pursuant to the Lending Agreement. We further hold, however, that the district court erred in concluding that the tax and royalty obligations at issue in this case were not used for commercial purposes in the United States. We also hold that the situs of these obligations is the United States. We have thus determined that both these FSIA conditions have been satisfied. These tax and royalty obligations therefore are not protected by sovereign immunity. It follows that the district court erroneously dismissed Af-Cap's cause of action and dissolved the writs of garnishment obtained by Af-Cap against the Garnishees. We therefore REVERSE the judgment and REMAND for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[stamped] Filed April 7, 2003

No. A 01 CA 100 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 154 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 213 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 270 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 321 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant.

No. A 01 CA 331 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

ORDER

BE IT REMEMBERED on the 17th day of March 2003 the Court held a hearing in the above-styled causes (A:01 CA 100 SS; A:01 CA 154 SS; A:01 CA 213 SS; A:01 CA 270 SS; A:01 CA 321 SS and A:01 CA 331 SS) on all pending matters, and the parties appeared by counsel of

record. Before the Court are Plaintiff's Motion to Substitute Parties [#94 in A:01 CA 100 SS; #26 in A:01 CA 154 SS; #23 in A:01 CA 213 SS; #22 in A:01 CA 270 SS, and #39 in A:01 CA 331 SS]; Garnishees' Motion for Partial Summary Judgment on Mootness Grounds [#82 in 100; #22 in A:01 CA 154 SS; #19 in A:01 CA 213 SS; #18 in A:01 CA 270 SS, and #35 in A:01 CA 331 SS]; Plaintiff's Motion for Permission to Execute [#58 in A:01 CA 321 SS]; Plaintiff's Motion to Incorporate Plaintiff's Motion For Permission to Execute [#90 in A:01 CA 100; #23 in A:01 CA 154 SS; #21 in A:01 CA 213 SS; #19 in A:01 CA 270 SS, and #36 in A:01 CA 331 SS]; Defendants and Garnishees' Motion for Judgment and For Incorporation of [*sic*] their Opposition (filed in A:01 CA 321 SS as #62) to Plaintiff's Motion to Execute [#96 in A:01 CA 100; #28 in A:01 CA 154 SS; #25 in A:01 CA 213 SS; #24 in A:01 CA 270 SS, and #41 in A:01 CA 331 SS]; and the Garnishees' Motions for Attorneys Fees and Costs [#16 in A:01 CA 154 SS; #13 in A:01 CA 213 SS; #11 in A:01 CA 270 SS, and #28 in A:01 CA 331 SS]. Having considered the motions, briefs in support, responses, replies, arguments of counsel at the hearing, post-hearing submissions, the case law, and the case files as a whole, the Court now enters the following opinion and orders.

Procedural Background

The current plaintiff, Af-Cap, Inc. ("Af-Cap"), is the sixth owner of the claims at issue in the above-styled causes. Af-Cap's predecessor in interest, the Connecticut Bank of Commerce ("the Bank"), was the assignee of a judgment entered in England against defendant Republic of Congo. On January 11, 2001, the bank brought an action

in a New York state court to enforce the England judgment; when Congo did not appear, the New York court granted summary judgment in favor of the Bank and entered an order granting the Bank permission to execute the judgment pursuant to 28 U.S.C. § 1610(c). Then, the Bank filed the New York judgment in the 345th District Court of Travis County to convert the judgment into a Texas judgment. At the same time, the Bank also filed a garnishment action against CMS Oil & Gas Company, CMS Oil & Gas International Company, CMS Nomeco International Congo Holdings, Inc., CMS Nomeco Congo, Inc., CMS Oil & Gas International, Ltd., and CMS Oil & Gas (Congo), Ltd. and Nuevo Energy Company, Congo Holding Company, Nuevo Congo Company, Nuevo Congo International, Inc., and Nuevo International Holdings, Ltd. in that court. The purpose of the writs of garnishment was to prohibit the garnishees from paying debts or delivering any property to the Congo. Subsequently, the Congo and all the garnishees removed the garnishment action (A:01 CA 100 SS) to this Court on the basis of diversity jurisdiction. The bank filed several additional garnishment actions, all of which were removed to the Court (A:01 CA 154, A:01 CA 213, A:01 CA 270, A:01 CA 331) along with the judgment action (A:01 CA 321).[1]

On March 16, 2001, this Court entered an order in Cause No. A:01 CA 100 dismissing the causes of action against the Congo and dissolved the writs of garnishment against the garnishees pursuant to the Foreign Sovereign Immunities Act, finding that both the tax obligations and the in-

[1] After the removal of the judgment action, the Bank nevertheless filed three more garnishment actions in state court. After the Congo removed the cases (A:01 CV 431, A:01 CV 489, A:01 CV 497), this Court dismissed them by order on August 3, 2001.

kind royalty obligations owed by the garnishees to the Congo were immune from execution and attachment by plaintiffs. (On May 9, 2001, this order was incorporated by reference in the other four pending garnishment actions.) The Bank appealed Cause No. A:01 CA 100 to the Fifth Circuit, which granted expedited review. While the appeal was pending, the judgment was assigned to Af-Cap and the Court stayed the four other garnishment actions pending a decision by the Fifth Circuit. In July 17, 2002, the Fifth Circuit issued its first opinion. *Connecticut Bank of Commerce v. Republic of Congo*, 299 F.3d 378 (5th Cir. 2002) (*Congo I*). Af-Cap sought a rehearing in banc and the Congo and garnishees sought a panel rehearing. Construing Af-Cap's petition as a petition for panel rehearing, the Fifth Circuit granted Af-Cap's petition in part and denied the Congo and Garnishees' petition. On August 29, 2002, the Fifth Circuit issued an amended opinion, withdrawing its July opinion, and vacating the dismissal of the garnishment action and writs. *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) (*Congo II*). After holding this Court and the parties had been focusing on the wrong issue, the Fifth Circuit remanded the case and instructed the Court to permit limited discovery. *Congo II*, 309 F.3d at 260-61. If [*sic*] turns out the royalty and tax obligations are not used for any commercial activity in the United States, the Fifth Circuit directed this Court to dissolve the writs of garnishment and dismiss the action. *Id.* The Court ordered discovery in compliance with the Fifth Circuit's instructions, and now that the discovery is complete, Af-Cap has filed its motion for seeking a turnover order or, alternatively, to permit Af-Cap to serve garnishment writs against CMS Nomeco Congo, Inc. ("CMS"), The Nuevo Congo Company ("Nuevo"), and

Nuevo Congo Ltd. (collectively, "the Garnishees"), which owe the Congo oil royalties and taxes, and CMS Oil and Gas (Services) Company, which owes the Congo taxes.

Factual Background

In 1979, the Congo issued a permit to drill offshore to its state-owned oil company, the Societe Nationale de Petrol du Congo ("SNPC").[2] On May 25, 1979, in order to exploit the permit, the Congo and SNPC entered into a joint venture with various oil companies to produce oil and gas. *See* Mot. to Execute Ex. 13 ("Convention"). The parties do not dispute that SNPC and the Garnishees are the current working interest owners under the Convention. *See* Mot. to Execute at 4; Opp. at 3. Currently, CMS is the operator of the joint venture and owns a 25% working interest, while Nuevo, Nuevo Congo Ltd. and SNPC are non-operators, possessing 18.75%, 6.25%, and 50% working interests, respectively. *See* Opp. at 3. The Congo is entitled to royalty on production from the working interest owners under the Convention, which it can elect to take in cash or in-kind.

The oil is produced at offshore wells in Congolese waters. The oil flows through a subsurface pipeline system to an offshore storage facility, a retired transport tanker called the "Conkouati," which is also located in Congolese waters. Once the Conkouati is filled with between 550,000 and 650,000 barrels of oil, CMS and Nuevo take a "lifting" and sell the oil. The Congo and Garnishees maintain the oil

[2] SNPC is the current name of the state-owned company, which at the time of the drafting of most of the relevant documents was known as Societe Nationale de Recherches et d'Exploitation Petrolieres, or "Hydro-Congo" for short.

is always sold on the Conkouati, and therefore title passes from seller to buyer in the Congo. *See* Tr. at 9. CMS and Nuevo keep an over/under accounting of the amount of oil they have lifted and sold, and note the Congo's royalty entitlement and SNPC's working interest entitlement under the Convention. *See* Mot. to Exec. Ex. 19 ("Over (Under) Schedule"). CMS and Nuevo continue to take liftings and sell the oil until the combination of the Congo's royalty entitlement and the SNPC's working-interest entitlement exceeds 275,000 barrels—or as the Defendants put it, until they are "under-delivered" by 275,000 barrels or more. *See* Tr. at 10; Mot. to Exec. Ex. 12 at GAR 03439-42 ("Am. to Lifting Agmt") at Arts. I, IV. At this point, SNPC takes a lifting and sells the oil. In this way, both the Congo's in-kind royalty entitlement and SNPC's working interest are satisfied.[3] Ordinarily, when SNPC conducts a lifting, it lifts about 550,000 to 650,000 barrels, at which point it is "over-delivered," which is accounted for in the over/under accounting described above. SNPC will not take another lifting until it is under-delivered by 275,000 barrels. Since the commencement of this action, and in accordance with the system just described, CMS, Nuevo, and Nuevo Congo Ltd. took and sold liftings 99, 100, 101, 102, 104, 105, 106, 107, 108, 110, 111 and 112. *See* Over (Under) Schedule. SNPC took and sold liftings 98, 103 and 109 on behalf of itself and the Congo, and is scheduled to take the next lifting, number 113, in early April 2003. *Id.*

[3] One dispute between the Plaintiff and the Congo is when the oil becomes the property of the Congo. The Congo contends its entitlement to its in-kind percentage of the oil accrues at each lifting, whereas the Plaintiff contends the royalty oil becomes the property of the Congo as soon as it comes out of the wellhead or sits at the gathering point (the Conkouati). The Court will address this in more detail in the context of the parties arguments.

Analysis

The general rule under § 1609 of the Foreign Sovereign Immunities Act (FSIA) is that assets of foreign states are immune from execution and attachment. 28 U.S.C. § 1609. There are exceptions, however, and the exception relevant in the instant cases is if a foreign sovereign waives its immunity from execution, courts in the United States may execute against "property in the United States . . . used for commercial activity in the United States." 28 U.S.C. § 1609(a)(1). So, even though the Congo waived its immunity from execution, this Court may only execute only against the Congo's property that is (1) in the United States, and (2) used for commercial activity in the United States. *Congo II*, 309 F.3d at 247.

In these cases, Af-Cap is attempting to garnish intangible property, namely, the Garnishees' obligations to pay taxes and royalties to the Congo. *Id.* at 259; Tr. at 16-17, 19; Mot. to Exec. at 35. Af-Cap claims the situs of the obligations is in the United States, and the Congo has used the obligations for commercial activity in the United States, and therefore this Court should permit Af-Cap to execute against the royalty and tax obligations. On the other hand, the Congo argues the tax obligations and in-kind royalty obligations the Garnishees owe the Congo are immune from garnishment under the FSIA because the situs of the obligations is in the Congo, and the Congo does not use the obligations for commercial activity in the United States.

I. "Used for Commercial Activity in the United States"

In its 2001 order, this Court inappropriately focused on whether the joint venture that gives rise to royalty and tax obligations is a "commercial activity within the United

States," when the appropriate question is whether the property to be garnished—the Garnishees' obligations to pay the Congo oil royalties and taxes—is used for commercial activity in the United States. *Congo II*, 309 F.3d at 260. For example, if the Congo used the Garnishees' royalty and tax obligations as collateral for a loan from a United States bank, that would constitute use of the obligations for a commercial activity in the United States. *Id.* at 259.

Af-Cap has articulated the following seven theories for how the Congo has used its property for commercial activity in the United States: (1) the Congo used the royalty obligations to pay a commercial debt in the U.S.; (2) the Congo used the royalty obligations in commercial negotiations in the U.S.; (3) the Congo used the royalty obligations to "pay a debt" (reimburse a maritime tax) to United [*sic*] U.S. oil companies; (4) the Congo pledged its royalty obligations to U.S. Oil companies; (5) the Congo sold the royalty oil to U.S. buyers or shipped it to the United States; (6) the Congo loaned its royalty oil to U.S. oil companies; and (7) the Congo used its royalty oil and tax proceeds to purchase goods and services in the United States. In opposition, the Congo contends that neither the royalty nor tax obligations are currently used for commercial activity in the United States, and consequently are not subject to garnishment.

A. Royalty Oil and Tax Proceeds

Af-Cap's last three arguments concern the *royalty oil* acquired by the Congo, as opposed to the Garnishees' intangible obligation under the Convention to deliver to the Congo a certain percentage of the oil produced in the joint venture. This, of course, is not the property at issue in

this case. The origin of Af-Cap's error is language in the Fifth Circuit opinion, which directed this Court to look at how the [*sic*] Congo "spends" its royalties and taxes. *Congo II*, 309 F.3d 251 ("What matters under the statute is not how the Congo made its money, but how it spends it. The amenability of these royalties and taxes to garnishment depends on what they are 'used for,' not on how they were raised."). But it is clear Af-Cap is seeking to garnish the Garnishees' obligation to pay taxes and royalties (or deliver oil) to the Congo; it is not seeking to garnish the royalty oil or tax proceeds themselves. *See* Mot. to Exec. at 35 & Exs. 1-4 (proposed writs of garnishments). Moreover, the Fifth Circuit clarified on rehearing that property at issue is the intangible royalty and tax obligations owed to the Congo by the garnishees. *Congo II*, 309 F.3d 259. Accordingly, what the Congo does with its royalty oil or tax proceeds after it acquires them is irrelevant to this dispute.[4]

B. The Garnishees' Tax Obligations to the Congo

Af-Cap has not articulated any theory of commercial use in the United States by the Congo of the oil companies' obligations to pay taxes. In so far as Af-Cap contends that the Congo uses *tax proceeds* for commercial activity in the United States, that argument is irrelevant for the reasons discussed in the previous section.

[4] The situation would be different if, for instance, the Congo directed the oil companies to send the oil (that the companies owed the Congo) to parties in the United States as payment for services or goods those parties performed or provided.

C. The Garnishees' Oil Royalty Obligations to the Congo

1. Settlement of the NUFI Debt

In 1989, the National Union Fire Insurance Company ("NUFI") obtained a judgment against the Congo, and in 1991, NUFI sued the Congo in federal district court in the Northern District of Illinois in an effort to collect its judgment by garnishing the tax and royalty obligations owed to the Congo under the Convention. NUFI and the Congo entered into a settlement agreement under which the Congo assigned NUFI a portion of its royalty interest under the Convention until such time as the underlying debt to NUFI was fully paid. The Illinois federal court entered a turnover order pursuant to the parties' settlement agreement, and ordered the garnishees to pay 50% of the royalty obligation they owed to the Congo, as each obligation became due, until the NUFI debt was extinguished. The Congolese Financial Minister singed [*sic*] a letter in 1991 giving irrevocable payment instruction to the Garnishees' predecessor to pay the debt, plus interest, until it was paid off. *See* Tr. at 48. The remainder of the royalty, i.e., the portion the companies did not pay directly to NUFI, was (since 1999) paid to the Congo in kind based on the latter's election. Ever since the NUFI settlement payments ended in August of 2002, the Congo takes its entire royalty in-kind.

Af-Cap maintains that the Congo's past use of the Garnishees' royalty obligation to settle this debt constitutes use of the Congo's property, namely, the oil royalty stream, for commercial activity in the United States. This argument raises three sub-issues: (1) whether settlement of commercial debt constitutes a commercial use; (2) whether

a past commercial use of the property renders the Garnishees' royalty obligations forever subject to garnishments; and (3) whether the property at issue in this case is more properly described as royalty stream, as Af-Cap suggests, or "a series of distinct receivables that accrue periodically," *see* Opp. at 25, as the Congo suggests.

In deciding whether an activity is commercial, the dispositive question is whether the act the foreign state performs is the type of act "by which a private party engages in 'trade or traffic and commerce.'" *Congo II*, 309 F.3d at 260 (citing *Argentina v. Weltover*, 504 U.S. 607, 614 (1992)). According to this standard, it seems that settling a commercial debt is commercial in nature because settling debts is a way in which a private party engages in commerce. The Congo apparently concedes as much.[5] Yet the Court has reason to pause before drawing this conclusion. Even though Af-Cap informed the Fifth Circuit about the NUFI settlement in its petition for rehearing,[6] and the Court described the arrangement between the Congo and NUFI in its 2001 order, the Circuit nevertheless stated: "In its petition for rehearing, [Af-Cap] does not allege any scenario under which the Congo has put its royalty or tax obligations at any point in time in the service of a commercial activity in the United States." *Congo II*, 309 F.3d at 258.

The reason for this pronouncement by the Fifth Circuit may lie not in the definition of commercial activity, but in its construction of the entire phrase, "used for commercial

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[5] Counsel for the Congo said at the hearing: "now that the Fifth Circuit has spoken and articulated a test, it certainly would not be in any sovereign's interest to use any obligations of (sic) the United States for any purpose such as paying off a commercial debt." *See* Tr. at 49.

[6] *See* Opp. Ex. G ("Bank's Pet. for Rehearing") at 10-11.

activity in the United States." The Fifth Circuit cited two federal district court cases from the District of Columbia as examples of how a court can evaluate the use of the property at issue. *Id.* at 257 n.7 (citing *Eastern Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606 (D.D.C. 1987), and *Flatlow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999)). In *Eastern Timber*, the district court evaluated whether a sovereign's bank account in the United States was used for commercial activity. First, the court noted that "the concept of 'commercial activity' should be defined narrowly because sovereign immunity remains the rule rather than the exception and because courts should be cautious when addressing areas that affect the affairs of foreign governments." 659 F. Supp. at 610 (internal citations omitted). The court concluded that the essential character of the activities for which the account was used was not commercial since it was primarily used to fund diplomatic and consular activities, even though the court conceded some portion of the funds is likely used in commercial activities. *Id.* The court explained that it "decline[d] to order that if any portion of a bank account is used for a commercial activity, then the entire account loses its immunity." *Id.* This Court has the same reservations: the use of the royalty obligations to settle one commercial debt should not render the Garnishees' royalty obligations to the Congo forever subject to garnishment. Admittedly, the NUFI settlement was not a de minimus use, considering it took several payments by the Garnishees over several years to pay off the debt. But the record simply does not show that the essential use of the royalty obligations was the repayment of commercial debts—it merely shows the Congo made a one-time irrev-

ocable commitment several years ago to use the property to settle one round of litigation over a debt.

Alternatively, the Court would hold that past uses, such as the NUFI settlement, do not satisfy the statutory mandate of § 1610(a) that sovereign property be "used for commercial activity in the United States" before it will be subjected to garnishment. The Fifth Circuit explicitly declined to resolve the temporal aspects of the phrase "used for" in § 1610(a), and specifically, whether past uses, or just current and impending uses, matter.[7] Meanwhile, the parties have demonstrated that the language of text does not dictate one reading or the other.[8] However, the Court is more persuaded by the argument that § 1610(a) applies only to present and impending uses. As the Fifth Circuit pointed out, one of the chief purposes of the FSIA is to limit the execution of sovereign property being put *immediately* to sovereign use. *Congo II*, 309 F.3d at 253 (citing H.R. Rep. 94-1487) (emphasis added). And that makes sense. Borrowing from the Fifth Circuit opinion, consider the example of the state-owned aircraft. *Id.* As the Circuit explained, if the craft is used in by the state in the

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[7] Although, when the Fifth Circuit described the legal standard under the FSIA, it employed the present tense. *See Congo II*, 309 F.3d at 251 ("Under the FSIA, a court may attach only a foreign state's 'property in the United States' when that property *is* '*used* for a commercial activity in the United States.' What matters under the statute is what the property *is* '*used* for,' not how it was generated or produced." (internal citations and original emphasis omitted, new emphasis added)).

[8] *See* Mot. to Exec. at 12, 16-17; Opp. at 28-29 & n.13-14; Reply at 8 n.7 (documenting a riveting grammatical debate about the proper understanding of the tense of "used for," and the significance of Congress's failure to insert "is or was used" or "is or intended to be used" as it did in other sections of the FSIA).

operation of its commercial airline in the United States, it would be subject to garnishment. *Id.* However, if the airplane is only used by the sovereign to shuttle a head-of-state back and forth for official visits, then it would not be subject to garnishment. *Id.* Logically extending the example, if the airplane was in the past used as part of the commercial fleet, but later designated as the official shuttle for the head-of-state, at which point the sovereign stopped using it as part of its commercial fleet altogether, it seems strange to say because the airplane was once commercially used, it is forever subject to garnishment regardless of the government's current or planned uses. Past uses may be relevant insofar as they are indicative of the sovereign's current use of its property or as evidence of the likely impending uses. But the Court holds that it is the current and impending uses of the property that determine whether it is subject to garnishment under the FSIA.

The Court is sensitive to Af-Cap's concerns that relying only on the future and impending uses encourages gamesmanship. However, for the most part, Af-Cap's argument is overstated. After the Fifth Circuit's opinion, foreign states will most likely be more cautious in making decisions about whether or not to use royalty obligations owed to them by U.S. companies as collateral for U.S. loans or other commercial purposes. Clarifications of a law invariably lead some parties to modify their behavior. But it does not seem likely that if, for instance, a U.S. company attempted to garnish a plane in a commercial fleet, the foreign state who owns the planes would, because of the present/impending use rule, convert that plane and every subsequent plane the U.S. company attempted to garnish into a government shuttle simply to avoid the garnishment of an airplane.

Finally, and as a second alternative holding,[9] the Court is persuaded by the Congo's argument that the NUFI settlement is irrelevant because the property that is the subject of these garnishment actions is the oil companies' royalty obligations to the Congo that accrued since lifting 109. In other words, the property at issue in this case, the Garnishees' royalty obligation to the Congo, is not one indivisible stream, but a "series of distinct receivables that accrue periodically." *See* Opp. at 25. Specifics help explain the argument. After the commencement of these actions, the Garnishees took liftings 99, 100, 101, and 102, at which point more than a 275,000 barrel combined obligation to the Congo and SNPC accrued. SNPC therefore took lifting 103 and consequently extinguished the

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[9] The Court declares this holding its second alternative to its primary holding because it is aware that Af-Cap has interpreted the Convention differently, albeit less persuasively, than the Congo and the Garnishees. Af-Cap contends that the Garnishees' obligation accrues not upon each lifting, but as when the oil is pumped from the ground into the Conkouati. *See, e.g.*, Reply at 4. However, the plain language of the Convention and the actions of the parties to the contract (the Congo and the Garnishees) verify their understanding of the Convention: CMS and Nuevo lift and sell the oil, and then calculate the royalty owed to the Congo based on the value of the oil they lifted and sold as dictated by Article 7.01 of the Convention, which states:

> The basis of the computation of the mining royalty paid in cash or kind is equal, for each COMPANY, to the value of the HYDROCARBONS *lifted* by such company, computed on the basis of the price determined in accordance with Exhibit II to the CONVENTION, less domestic transportation, processing, storage and loading charges as said charges appear from the COMPANY's accounts and constitute tax deductible expenses. The royalty is not due on those quantities of HYDROCARBONS lost or used for the PETROLEUM WORKS.

(Emphasis added.) The obligation accrues upon the lifting of the oil.

obligation the Garnishees' owed the Congo. The obligations arising from liftings 99, 100, 101, and 102 can no longer be garnished since the Congo has received the oil to which it was entitled. Carrying forth the analysis, SNPC's lifting 109 extinguished the obligations that accrued on the Garnishees' liftings 104 through 108. If the wells went dry and the Garnishees lifted no more oil, they would have no royalty obligation to the Congo. For this reason the obligation is a contingency. Accordingly, the only way for Af-cap to prevail is to show that the unpaid obligations the Garnishees currently owe the Congo (on the liftings since 109) are being used for commercial activity in the United States. The NUFI settlement is therefore inapplicable because it applied to past distinct receivables that accrued and have since been extinguished by SNPC liftings.

2. Commercial Negotiations Related to the Itochu Debt

Af-Cap's next theory is that when the Congo, in settlement negotiations regarding a debt, called the Itochu debt, discussed the possibility of using the royalty obligations to settle that debt, that constituted use for a commercial activity in the United States. NUFI and its parent company, American International Group ("AIG"), hold the Itochu debt. In August of 2001, NUFI/AIG met with the Congo in New York to discuss resolving the debt. In May of 2002, the parties met again and the evidence suggests the Congo proposed a settlement that involved the Congo using the oil royalty obligations to repay the Itochu debt. Ultimately, the parties never agreed to use the royalty obligations to settle the Itochu debt the way NUFI and the Congo agreed to use them for the NUFI set-

tlement.[10] Nevertheless, Af-Cap contends these negotiations constitute commercial activities and that the Congo made the royalties "instrumental" to the negotiation 'process' by offering them as a 'means' to settle the debt." *See* Mot. to Exec at 19 (citing *Congo II*, 309 F.3d at 254).

That the Congo discussed or even proposed in commercial negotiations that it use[d] [*sic*] the royalty obligations to settle the debt may constitute "use in connection with commercial activity," but Af-Cap has not provided authority for its argument that it constitutes "use for commercial activity."[11] The Fifth Circuit explained the "used for commercial activity" exception to execution immunity embodied in § 1610(a) of the FSIA is narrower than the "used in connection with commercial activity" exception to jurisdictional immunity embodied in § 1605(a) of the FSIA. *Congo II*, 209 F.3d at 254-57. Clarifying the scope of the execution immunity exception, the Circuit stated, "to use property in the service of commercial activity, within the ordinary meaning of 'use,' would be to put the property in

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[10] Af-Cap claims that the Congo and NUFI/AIG did reach an agreement to use the royalty obligations, which the Congo later reneged. The Congo explains the agreement was never approved by the Congolese Minister of Finance. Regardless, the evidence shows the royalty obligations were never actually used to repay the Itochu debt.

[11] The cases cited by Af-Cap relate to the FSIA's exception to jurisdictional immunity. *See Mot. to Exec.* at 19 (citing *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992); *Good v. Aramco Servs. Co.*, 971 F. Supp. 254, 257 (S.D. Tex. 1997). Af-Cap contends this does not matter because it is just citing them for their definition of "commercial activity." But even if the settlement negotiations constitute commercial activity, *Moats* and *Good* do not help the Court answer the dispositive question, which is whether the royalty obligations were "used for" the settlement negotiations in the manner articulated by the Fifth Circuit.

the service of a commercial activity, to carry out the activity by means of the property." *Id.* at 254. Even assuming that negotiation of the Itochu debt did constitute a "commercial activity,"[12] the Congo did not carry out the negotiations "by means of" the Garnishees' royalty obligations. It just discussed the royalty obligations as a potential way to settle the debt during the negotiations. In comparison, if instead the parties had reached a settlement agreement to use the royalty obligations to repay the debt, the debt would be repaid "by means of" the Garnishees' royalty obligations to the Congo. A foreign state should be able to discuss the possibility of utilizing state property in commercial transactions, and then after consideration of various consequences (including the consequences for the

[12] The Court notes that the cases Af-Cap has cited for the proposition that negotiations constitute commercial activity almost all involved negotiations that resulted in final agreements, including *Moats* and *Good*. *See* Mot. to Exec. at 19-20 (also citing a Fourth Circuit case and New Jersey and New York district court decisions, both over twenty years old). Af-Cap maintains *MCI Telecom. Corp. v. Alhadhood*, 82 F,3d 658 (5th Cir. 1996) is "binding precedent of the Fifth Circuit" that establishes the "negotiations here constitute 'commercial activity' irrespective of whether an agreement was reached." *See* Reply at 10. However, the Court believes Af-Cap has overstated the holding of *MCI* (which notably, also addressed the jurisdictional, not execution, commercial activity exception). While *MCI* did not rule out the possibility that commercial negotiations that do not result in final agreements nevertheless constitute "commercial activity" under the FSIA, neither did it conclusively establish that they did. *See MCI*, 82 F.3d at 663 (explaining "private parties may engage int alks, [*sic*] negotiations, and may even make promises to resolve disputes, but not all such activity will be deemed 'commercial,'" and ultimately holding "alleged promises made through diplomatic channels do not constitute commercial activity").

asset's immunity), decide against using the property without sacrificing the asset's immunity.

3. Payment of "Maritime Tax Debt" to U.S. Oil Companies

Af-Cap's next theory is when the Congo permits the Garnishees to deduct from their royalty obligations in order to reimburse the Garnishees for a Congolese maritime tax they paid, that constitutes use of the royalty obligation for a commercial activity—namely, the repayment of a "debt" owed by the Congo to the Garnishees. The undisputed facts are the Garnishees pay a maritime tax to the Congo on behalf of their oil shipping companies. Because they believe they should not have to pay the tax under the Convention, the Garnishees deduct some of the oil to which the Congo would otherwise be entitled as reimbursement. The Garnishees claim this is self-help, but Af-Cap avers the Congo has at least acquiesced to this arrangement.[13] Even assuming Af-Cap is right, the Garnishees' obligation to pay taxes to the Congo is not a commercial obligation—taxation, and conversely, tax forgiveness, are uniquely governmental functions. *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, (S.D.N.Y. 1986), *aff'd*, 854 F.2d 1314 (2nd Cir. 1987) (holding the levy and collection of taxes is an exercise of sovereign power and refusing to garnish tax revenues); *LNC Inv., Inc. v. Republic of Nicaragua*, 2000 WL 745550, at *4 (S.D.N.Y. Jun. 8, 2000) (relying on *Liberian East*

[13] Af-Cap's argument that the tax is illegal is not relevant to the question either. *See* Mot. to Execute at 21 n.12; Reply at 12 n. 9. Even if this Court could adjudge whether or not a foreign government's tax is legal (which it assuredly cannot), the collection and reimbursement of an illegal tax is not a commercial activity either.

Timber to hold the same). Accordingly, the use of the royalty obligations to reimburse the Garnishees for overpayment of taxes to the Congo is not "use for commercial activity in the United States."

4. "Pledge" of Royalty Obligations to Cover Operating Expenses

Af-Cap's final theory is Af-Cap uses its royalty obligations for commercial activities in the United States by pledging them to the Garnishees in exchange for their payment of joint venture expenses. More specifically, Af-Cap explains SNPC has a 50% working interest under the Convention, but it does not pay its pro rata expenses. Instead, the Garnishees pay the expenses and what SNPC owes is deducted from its oil entitlement by the Garnishees. Af-Cap describes this as an "advance" or "loan" by the Garnishees in return for a "pledge" of Congo's and SNPC's oil. In Af-Cap's words, "the Congo's use of the royalty to secure/collateralize the advances from the U.S. Oil Companies and to repay the advances is 'commercial activity in the United States.'" *See* Mot. to Exec. at 23. First of all, in so far as Af-Cap is claiming the *royalty oil* is being used as collateral, this argument, as the Court has now iterated several times, is irrelevant to the question of whether the Garnishees' *royalty obligation* to the Congo can be garnished.[14] Regardless, under the Convention the Congo is entitled to receive royalty interests from the working interests owners, but is not a working interest owner itself and therefore does not bear operation costs. SNPC, on the other hand, is a working interest owner. CMS advances expenses and deducts reimbursements for SNPC, a work-

[14] *See*, *supra*, section II. A.

ing interest owner with the obligation to pay its share of expenses, not the Congo. *See* Mot. to Exec. Ex 89 ("Joint Operating Agreement") at 8.02, 9.01-9.02.

II. "Property in the United States"

In order to garnish the Congo's royalty and tax obligations, the obligations must be "property in the United States" and "used for commercial activity in the United States." 28 U.S.C. § 1610(a)(1); *Congo II*, 309 F.3d at 247, 265. While the Fifth Circuit provided guidance on the question of "use for commercial activity in the United States" prong of the inquiry, it explicitly declined an invitation to answer the question of whether the obligation where "property in the United States," suggesting the case could more easily be resolved on the commercial use question. *Id.* at 265. Because the Court has concluded the Congo does not use its royalty and tax obligations for commercial activity in the United States, it need not address the issue of the situs of the obligations.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Unopposed Motions to Substitute Parties [#94 in A:01 CA 100 SS; #26 in A:01 CA 154 SS; #23 in A:01 CA 213 SS; #22 in A:01 CA 270 SS; and #39 in A:01 CA 331 SS] are GRANTED and the henceforth the cases shall proceed under the styles as worded in this order;

IT IS FURTHER ORDERED that Plaintiff's Motions to Incorporate Plaintiff's Motion to Execute (filed in A:01 CA 321 SS as #58) [#90 in A:01 CA 100 SS; #23 in A:01 CA 154 SS; #21 in A:01 CA 213 SS; #19 in A:01 CA 270 SS; and #36 in A:01 CA 331 SS] are GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motions for Permission to Execute [#58 in A:01 CA 321 SS and incorporated by reference in A:01 CA 100 SS; A:01 CA 154 SS; A:01 CA 213 SS; A:01 CA 270 SS; and A:01 CA 331 SS] are DENIED;

IT IS FURTHER ORDERED that Garnishees' Motions for Partial Summary Judgment on Mootness Grounds [#82 in A:01 CA 100 SS; #22 in A:01 CA 154 SS; #19 in A:01 CA 213 SS; #18 in A:01 CA 270 SS; and #35 in A:01 CA 331 SS] are DISMISSED AS MOOT;

IT IS FURTHER ORDERED that Defendants and Garnishees' Motions for Judgment and for Incorporation of their Opposition (filed in A:01 CA 321 SS as #62) to Plaintiff's Motion for Permission to Execute [#96 in A:01 CA 100 SS; #28 in A:01 CA 154 SS; #25 in A:01 CA 213 SS; #24 in A:01 CA 270 SS, and #41 in A:01 CA 331 SS] are GRANTED;

IT IS FINALLY ORDERED that the Garnishees SHALL SUPPLEMENT their Motions for Attorneys Fees and Costs [#16 in A:01 CA 154 SS; #13 in A:01 CA 213 SS; #11 in A:01 CA 270 SS, and #28 in A:01 CA 331 SS] within fifteen (15) days of the entry of this order, and any responses to the motions for attorneys fees or the supplements thereto shall be filed within fifteen (15) days of the filing of the supplements by the garnishees.

SIGNED this the 7th day of April 2003.

/s/ SAM SPARKS
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[stamped] Filed April 7, 2003

No. A 01 CA 100 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 154 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 213 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 270 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

No. A 01 CA 321 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant.

No. A 01 CA 331 SS

AF-CAP, INC.,

Plaintiff,

vs.

THE REPUBLIC OF CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, et al.,

Garnishees.

JUDGMENT

BE IT REMEMBERED on this the 7th day of April 2003, the Court, having denied Plaintiff's Motions for Permission to Execute, hereafter enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff Af-Cap, Inc. TAKE NOTHING in this cause against the Republic of Congo, that the Writ of Garnishments in the above-styled cause of action are DISSOLVED; and that let the Defendant and Garnishees go hence without delay and with their costs, for which let execution issue against plaintiff.

SIGNED this the 7th day of April 2003.

/s/ SAM SPARKS
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

July 17, 2002.
As Amended on Rehearing August 29, 2002.
No. 01-50409

CONNECTICUT BANK OF COMMERCE,

Plaintiff-Appellant-Cross-Appellee,

v.

THE REPUBLIC OF CONGO,

Defendant-Appellee,

CMS OIL AND GAS COMPANY; CMS OIL AND GAS (INTERNATIONAL) COMPANY; CMS NOMECO INTERNATIONAL CONGO HOLDINGS, INC.; CMS NOMECO CONGO, INC.; CMS OIL AND GAS (HOLDINGS), LTD.; CMS OIL AND GAS (INTERNATIONAL) LTD.; CMS NOMECO CONGO LDC; CMS OIL AND GAS (CONGO) LTD.; NUEVO ENERGY COMPANY; THE CONGO HOLDING COMPANY; THE NUEVO CONGO COMPANY; NUEVO CONGO LTD.; NUEVO INTERNATIONAL, INC.; NUEVO INTERNATIONAL HOLDINGS LTD.,

Garnishees-Appellees-Cross-Appellants.

Appeals from the United States District Court for the Western District of Texas.

B e f o r e EMILIO M. GARZA, PARKER and DENNIS, *Circuit Judges.*

EMILIO M. GARZA, *Circuit Judge*:

The Connecticut Bank of Commerce appeals the district court's judgment that the Foreign Sovereign Immunities Act renders royalty and tax obligations owed by certain Texas oil companies to the Republic of Congo immune from garnishment.

A predecessor in interest to the Connecticut Bank of Commerce (hereinafter "the Bank") lent the Congo $6.5 million. In the loan agreement, the Congo waived any right to claim foreign sovereign immunity either from suit or from attachment or execution of its property. The Congo defaulted on the loan. The Bank acquired the rights to a valid London judgment against the Congo for the outstanding principal and interest. In order to turn the foreign judgment into a U.S. judgment, the Bank filed suit in a state court in New York, as permitted by the terms of the loan agreement. The Congo did not appear in the New York action, and the state court entered a default money judgment in favor of the Bank.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611, provides foreign sovereigns with immunity from execution against their property to satisfy an adverse judgment. 28 U.S.C. § 1609. This statutory immunity is subject to several exceptions. One exception is that, if a foreign sovereign waives its immunity from

execution, U.S. courts may execute against "property in the United States . . . used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(1). Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria. *Id.*

Only a court may execute against a foreign sovereign's property under the FSIA. 28 U.S.C. § 1610(c) ("No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution . . ."). Some jurisdictions permit judgment creditors to execute against property simply by applying to the clerk of the court or to a sheriff. Section 1610(c) does not permit such summary procedures to be used when a foreign sovereign's property is involved. Instead, it requires a court to enter the writ of execution, so that the court can determine whether the property in question falls within one of the statutory exceptions to foreign sovereign immunity.

After obtaining the default judgment from the New York state court, the Bank asked that court to enter what it called a "1610(c) order." The only order mentioned by § 1610(c) is an order actually attaching or executing against property. 28 U.S.C. § 1610(c) ("the court has ordered such attachment or execution . . ."). The New York court, however, acting at the Bank's request, entered a "1610(c) order" that did not purport to execute against any property within New York or elsewhere. Instead, it provided in declaratory terms that the Bank had "permission" to execute against the Congo's property wherever it may be found. The New York court authorized the Bank to execute against "any assets or other property of the Congo of any nature, irrespective of the use or intended use of such

property . . . including any . . . payments or obligations due to the Congo from any oil and gas exploration and development companies. . . ."

The Bank registered its New York judgment in Texas state court and obtained, from the clerk of the Texas state court and without any court order, a writ of garnishment directed to a group of Texas oil companies: CMS Nomeco Congo, Inc., The Nuevo Congo Ltd., and some of their affiliate companies (hereinafter "the garnishees"). The writs of garnishment prohibited the garnishees from paying any debts to the Congo. The Congo and the garnishees removed the garnishment action to the United States District Court for the Western District of Texas and filed a motion to dismiss. The district court dissolved the writs of garnishment and dismissed the action. It held that, notwithstanding the obligations of the Full Faith and Credit statute and the New York court's "1610(c) order," it was not prohibited by res judicata from considering on a blank slate the amenability of the garnishees' debts to garnishment under the FSIA. It determined that the royalty and tax payments owed by the oil companies to the Congo did not arise from a "commercial activity in the United States," and therefore were not subject to garnishment. The Bank appeals.

I

The Full Faith and Credit Statute, 28 U.S.C. § 1738, does not bar the fresh consideration of whether the debts owed from the garnishees to the Congo are subject to garnishment under the FSIA because the New York court's determinations about garnishment were not necessary to any judgment issued by that court. Under New York law,

extraneous determinations not necessary to sustain a default judgment are not entitled to any res judicata effect.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, provides that the judgments of state courts "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." The statute extends to the federal courts the requirements of the Full Faith and Credit Clause of the Constitution, which applies of its own force only to state courts. *E.g.*, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 n. 24, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982). Section 1738 requires us to afford the New York court's "1610(c) order" the same preclusive effects that the order would enjoy in the New York courts. But we need not give any greater res judicata effect to the "1610(c) order" than New York itself would afford.

New York courts do not give preclusive effect to gratuitous determinations in a prior action. Res judicata operates to bar relitigation only of issues necessary to the judgment. *Rader v. Mfrs. Cas. Ins. Co. of Philadelphia*, 139 N.Y.S.2d 388 (N.Y. Sup. Ct. 1955), *aff'd*, 1 A.D.2d 799, 149 N.Y.S.2d 220 (N.Y. App. Div. 1956); *Pike v. Irving*, 259 A.D. 303, 19 N.Y.S.2d 219 (N.Y. App. Div. 1940); *Finkelstein v. Equitable Life Assur. Soc. of the United States*, 256 A.D. 593, 11 N.Y.S.2d 135 (N.Y. App. Div. 1939), *aff'd*, 281 N.Y. 690, 23 N.E.2d 19 (1939). Especially in the case of a default judgment, res judicata applies only to issues essential to support the judgment as requested by the pleadings; subsequent developments in the case cannot enlarge the scope of the judgment or the scope of res judicata beyond the complaint. *Novak & Co. v. N.Y. City Hous. Auth.*, 105 A.D.2d 665, 482 N.Y.S.2d 7 (N.Y. App. Div. 1984) ("Since the prior judgment was on

default, the issues necessarily determined there are limited to those essential to the judgment."); N.Y. C.P.L.R. 3215(b) (McKinney 2001) (providing that, in a default judgment, the "judgment shall not exceed in amount or differ in type from that demanded in the complaint"). Any determinations beyond those necessary to sustain the judgment requested by the pleadings do not preclude subsequent reexamination.

For example, in *Finkelstein*, the defendant issued a number of insurance policies to the plaintiff. Some of the policies paid benefits when the insured became "presumably permanently disabled" (type 1 policies) and others paid benefits only when the insured became actually "permanently disabled" (type 2 policies). Under New York law, this difference in phrasing had an important legal effect. Under a type 1 policy, if the insured was disabled for a certain period of a time set out in the policy, he was entitled to an irrebuttable presumption of permanent disability. Under type 2 policies, being disabled for the amount of time set out in the policy gave rise to a presumption of permanent disability, but the presumption could be rebutted. In a prior action, Finkelstein obtained a judgment on a type 1 policy. He later brought an action on other policies, both type 1 and type 2, asserting that res judicata barred relitigation of the issue of his disability. The Appellate Division held that the prior action was not res judicata as to the type 2 policies, even if the previous court had determined that Finkelstein was not only "presumably" disabled, but that he was actually disabled. It reasoned that "in the prior action all that the insured was required to establish was total and presumably permanent disability . . . anything more than that which the insured may have proved was not within the issues in that action, and, hence, *the judgment*

as to such extraneous matters is not res judicata." *Finkelstein*, 11 N.Y.S.2d at 138 (emphasis added). This principle applies *a fortiori* to default judgments, where it would be impossible for the defendant to predict in advance of his default any extraneous determinations a court might make. *See Pike*, 259 A.D. at 303- 304 (limiting the res judicata effect of a prior default judgment to the "claim as alleged in [the] complaint" and reasoning that the defendant's "default, for whatever reason, did not authorize the entry of a judgment against him beyond the scope of the prayer for relief").

To the extent that the New York court made determinations about the amenability of the Congo's property to garnishment, those determinations were not in any way necessary to the money judgment sought by the pleadings. Here, the only pleading was the bank's complaint[1], which sought to convert a money judgment in London into a money judgment in New York. The New York court awarded the money judgment when the Congo failed to appear. The Congo does not challenge the validity of that judgment. Under New York law, the pleadings define the scope of a default judgment and therefore the scope of res judicata. N.Y. C.P.L.R. 3215(b); *Novak & Co.*, 482 N.Y.S.2d at 8-9. To the extent that the New York court made legal determinations not necessary to awarding the money judgment, those determinations are not entitled to any res judicata effect.

Here, the "1610(c) order" and the determinations contained in the order were not necessary to awarding the

[1] The Bank actually plead by way of a "Motion for Summary Judgment in Lieu of Complaint," apparently a permissible pleading under New York law. For the sake of simplicity, we will refer to the Bank's pleading as its "complaint."

money judgment. Section 1610(c) has nothing to do with the merits of an action against a foreign state, and does not somehow turn the amenability of a foreign state's property to garnishment into a necessary part of the merits court's consideration. Section 1610(c) is directed entirely to a court attaching or executing against a foreign state's property, and not at all to the merits court. The statute provides:

> No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.[2]

The statute has three elements. First, as discussed above, its chief purpose is to provide that only a court may enter an order of attachment or execution against a foreign state's property. 28 U.S.C. § 1610(c) ("until the *court* has ordered such attachment and execution").[3] Second, it pro-

[2] 28 U.S.C. § 1608(e) requires that a copy of any default judgment entered against a foreign state be served on that state in the same manner proscribed by statute for serving complaints against foreign states.

[3] The House Report explains that the purpose of § 1610(c) is to require a court to issue the order of attachment or execution. It explains:

> Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state.

H.R. REP. NO. 94-1487, at 30 (1976).

vides that the court may order the attachment or execution only as "referred to in subsections (a) and (b)." Subsections (a) and (b) spell out the exceptions to the general rule that a foreign sovereign's property is immune from execution or attachment. *See* 28 U.S.C. § 1609. Third, the court may execute against property only after "determining that a reasonable period of time has elapsed following entry of judgment." This phrase requires courts to acknowledge, for example, that a foreign sovereign may have to pass separate legislation to authorize the payment of the necessary funds. H.R. REP. NO. 94-1487, at 30 (1976). It allows courts discretion to wait for a foreign sovereign to make alternate arrangements to pay a debt before executing against any property. *Id.* Nothing in section 1610(c) directs itself to the court issuing the judgment on the merits; it is all directed to the court ordering "such attachment or execution." Nothing in § 1610(c) makes any determination about the amenability of a foreign sovereign's property to attachment or execution a necessary part of the underlying money judgment.

The "1610(c) order" had no effect in the New York litigation at all: the determinations in the "1610(c) order" could conceivably have legal effect only if some other court actually executing on the Congo's property were to treat the order as res judicata. The order was therefore not necessary to any coercive relief prayed for in the complaint or granted by the state court, and under New York law the order is not entitled to any preclusive effect.

Although the Bank does not say so in as many words, it essentially asks us to treat the New York court's "1610(c) order" as a declaratory judgment, as a separate and distinct form of relief from the money judgment issued by the New York court. It points out that its motion requesting the

"1610(c) order" was served separately on the Congo. But the Bank's complaint did not seek a declaratory judgment against the Congo, it sought a money judgment. If the Bank had filed what was clearly a declaratory judgment action, then we would have a different situation. Nor could the post-judgment motion requesting the 1610(c) order enlarge the scope of the issues determined by the default judgment. As explained above, New York law limits the scope of a default judgment to the issues necessary to resolve the questions raised by the *pleadings*. N.Y. C.P.L.R. 3215(b) (McKinney 2001); *Novak & Co.*, 482 N.Y.S.2d at 8-9. The post-judgment motion asking for a 1610(c) motion was not a pleading. N.Y. C.P.L.R. 3011 (McKinney 2001) ("There shall be a complaint and an answer. . . .There shall be no other pleading unless the court orders otherwise."). Almost any gratuitous determination could retroactively be termed a "declaratory judgment." If the Bank wanted a declaratory judgment, it needed to ask for one in its complaint.

New York does not require civil litigants to show up in court only to fall on their swords. If a defendant does not contest his liability to the plaintiff as set out in the complaint, he need not appear in the action. Defaulting does not carry the risk that the court will enter a judgment or make determinations not essential to awarding the relief called for in the complaint. The action in New York was an action to turn a money judgment in London into a money judgment in New York. The Congo had no way of knowing from the complaint that the New York court would make determinations and issue declarations that had nothing to do with a money judgment. The immunity of the royalty and tax payments to garnishment was not a defense to a claim for money damages, and whatever the New York

court may have said about the immunity of the Congo's assets to execution had nothing to do with the merits of the action it was considering. Such statements were mere superfluities. Now that the immunity of these assets to garnishment really is in issue, the Congo is not precluded from asserting its sovereign immunity defense.

II

Under the FSIA, courts may attach only a foreign state's "property in the United States" when that property is "*used* for a commercial activity in the United States." 28 U.S.C. § 1610(a) (emphasis added). What matters under the statute is what the property is "used for," not how it was generated or produced. If property in the United States is used for a commercial purpose here, that property is subject to attachment and execution even if it was purchased with tax revenues or some other noncommercial source of government income. Conversely, even if a foreign state's property has been generated by commercial activity in the United States, that property is not thereby subject to execution or attachment if it is not "used for" a commercial activity within our borders. The district court (and the litigants) have focused on the question of whether the Congo's joint venture with the garnishees, which gave rise to the royalty and tax obligations that the Bank wants to garnish, was a "commercial activity in the United States." This was the wrong question to consider. What matters under the statute is not how the Congo made its money, but how it spends it. The amenability of these royalties and taxes to garnishment depends on what they are "used for," not on how they were raised.

Until 1952, the United States generally afforded foreign sovereigns absolute immunity from the jurisdiction of the courts, including complete immunity from execution. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983). Unlike state or federal sovereign immunity, foreign sovereign immunity does not derive from the constitution. *Id.* Foreign sovereign immunity instead derives from concerns of grace and comity between nations. As a result, the Supreme Court regularly deferred to the Executive Branch in determining whether to take jurisdiction over a case concerning a foreign sovereign. *Id.* The Executive was in a better position to anticipate the foreign relations consequences of subjecting a foreign state to suit in a U.S. court. Under the theory of absolute sovereign immunity, the Executive would regularly recommend that courts decline to take jurisdiction over any case against a foreign sovereign.

In 1952, the State Department issued the "Tate Letter," which announced the Department's adoption of the "restrictive" theory of foreign sovereign immunity. *Id.* at 486-87, 103 S. Ct. 1962. Under the restrictive theory, which many other nations had already adopted, the State Department would continue to recommend immunity in suits concerning a foreign state's sovereign, public acts. The Department, however, would recommend denying immunity in suits based on a foreign sovereign's strictly commercial activities. The Tate Letter did nothing to modify the complete immunity enjoyed by foreign sovereigns from execution against their property. If a plaintiff successfully obtained a final judgment against a foreign sovereign, he still had to rely on the foreign state to pay the judgment voluntarily. H.R. Rep. No. 94-1487, at 8, 27 ("[T]he traditional view in the United States concerning

execution has been that the property of foreign states is absolutely immune from execution. . . . Even after the 'Tate Letter' of 1952, this continued to be the position of the Department of State and of the courts."); Restatement (Third) of the Foreign Relations Law of the United States § 460 cmt. a (1987) (hereinafter "Restatement").

The FSIA shifted the responsibility to make determinations about foreign sovereign immunity from the State Department to the courts. *Verlinden*, 461 U.S. at 488, 103 S. Ct. 1962. For the most part, the FSIA codifies the restrictive theory of sovereign immunity as described in the Tate Letter. *Id.* But the FSIA also modified the rule barring execution against a foreign state's property by "*partially* lowering the barrier of immunity from execution, so as to make this immunity conform *more closely* with the provisions on jurisdictional immunity in the bill." H.R. Rep. No. 94-1487, at 27 (emphasis added). For both immunity from jurisdiction and immunity from attachment, "commercial activity" generally constitutes the touchstone of the immunity determination. But immunity from execution is nevertheless narrower than jurisdictional immunity. *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984). In *De Letelier*, the Second Circuit surveyed both the history of immunity from execution and the international law context at the time Congress passed the FSIA. The court concluded that Congress intended to lift immunity from execution only "in part," that it did not intend to reverse completely the historical and international antipathy to executing against a foreign state's property even in cases where a judgment could be had on the merits. *Id.* It attributed the differences in phrasing between the jurisdictional (§ 1605) and execution (§ 1610) immunity sections

in the FSIA to a deliberate choice to narrow the scope of immunity from execution.

Two subsections of the FSIA spell out the exceptions to immunity from execution. 28 U.S.C. § 1610(a) governs the immunity from execution of property belonging to foreign states. 28 U.S.C. § 1610(b) governs the immunity from execution of property belonging to an "agency or instrumentality" of a foreign state engaged in commercial activity in the United States. Subsection (a), regarding property belonging directly to a foreign state, permits execution only narrowly, when the property is "in the United States" and "used for a commercial purpose in the United States." Subsection (b) is broader; it permits execution of "*any* property in the United States" belonging to the agency or instrumentality, regardless of how the agency or instrumentality uses the property. Subsection (a) is generally thought to be more restrictive than subsection (b). *De Letelier*, 748 F.2d at 799 (explaining that Congress "was more cautious when lifting immunity from execution against property owned by the State itself.").

Because subsection (a) is intended to be narrower than subsection (b), we pay close attention to the differences in phrasing between the sections. Subsection (a) allows courts to execute only when the property is "used for a commercial activity," whereas subsection (b) permits execution of "any property," regardless of its use. The focus in subsection (a) is plainly on the "use" to which the property is put. As the Restatement explains, "For purposes of post-judgment attachment and execution, the Foreign Sovereign Immunities Act draws a sharp distinction between the property of states and the property of state instrumentalities . . . The property of states may be attached only if it is or was used in commercial activity; the property of state

instrumentalities may be attached without any such limitation, so long as the instrumentality itself is engaged in commercial activity in the United States." RESTATEMENT § 460 cmt. b.

Restricting execution against property belonging to foreign states depending on the "use" of that property, rather than its source, helps accomplish the purpose of limiting execution against property directly belonging to a foreign state more severely than execution against property belonging to an instrumentality. The premise is that agencies or instrumentalities engaged in commercial activity are akin to any other player in the market, and that their functions are primarily commercial. *Id.* On the other hand, the "primary function of states is government." *Id.* One of the chief motifs of the FSIA is to limit as much as possible disrupting the "public acts" or "*jure imperii*" of sovereigns, while restricting their purely commercial activity. H.R. Rep. 94-1487, at 7. Confiscating funds that are being put immediately to some sovereign use interrupts a sovereign's public acts regardless of what kind of activity generated the funds, commercial or noncommercial.

An example helps clarify the point. Consider an airplane owned by a foreign government and used solely to shuttle a foreign head-of-state back and forth for official visits. If the plane lands in the United States, it would not be subject to attachment or execution. The plane is not "used for" any commercial activity, in the U.S. or elsewhere. It plainly would not matter how the foreign government bought the plane, raised the purchase price, or otherwise came into ownership. Even if the government received the plane as payment from a U.S. company in an obviously commercial transaction, that would not somehow transform the "use" of the plane into a commercial use. Regardless of how the

government came to own the plane, a U.S. court could never under the terms of the FSIA confiscate a plane used solely to transport a foreign head-of-state on official business. Attaching the plane and selling it in execution of a judgment would go too far in interrupting the public acts of a foreign state.[4]

The phrase "used for" in § 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the "use" of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States. The statute means what it says: property of a foreign sovereign, unlike property belonging to a mere agency or instrumentality, may be executed against only if it is "used for" a commercial activity. That the property is revenue from or otherwise generated by commercial activity in the United States does not thereby render the property amenable to execution.

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[4] The Third Circuit relied on similar reasoning in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), in rejecting an attempt to attach real property used as a residence for Libya's Head of Mission to the United Nations. The city of Englewood argued that the property was subject to attachment because it was "acquired by Libya in a commercial transaction between a seller and a buyer." *Id.* at 36. The court rejected this argument, reasoning that if "acquisition of property in a particular commercial transaction or act indelibly stamped the property as used for commercial activity, even foreign embassies and chancelleries would be subject to execution. Plainly Congress did not intend a result so inconsistent with recognized principles of international law." *Id.* at 36-37. The determinative issue, according to the *Englewood* court, was not whether the property was acquired in a commercial transaction, but instead whether Libya's present use of the property was commercial. *Id.* at 37.

III

In its petition for rehearing, the Bank advances an interpretation of "used for" that conflicts with the plain meaning of that phrase. The Bank contends that property is "used for" a commercial activity in the United States whenever it is "integral to" or "related to" a commercial activity located here. The Bank relies on a sentence from Judge Dennis's separate opinion: "Because the . . . royalties to the Congo *were necessary and integral to, and therefore used for*, the joint venture . . . those royalty obligations fell within the exceptions to immunity from execution provided for by FSIA § 1610(a)(1)" (emphasis added). In our view, this sentence is a non sequitur. The phrase "used for" on its face denotes something different and more specific than the phrases "integral to" or "necessary to." It also denotes something distinct (and narrower) than the other phrases the Bank uses in its petition, such as "related to" or "contemplated by."

The dictionary defines "to use" differently from any of these phrases. It defines "use," as relevant here, to mean: "to carry out a purpose or action by means of: make instrumental to an end or process . . . UTILIZE." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2524 (Philip B. Gove ed., Merriam Webster Inc. 1993) (1961). To use property for a commercial activity, within the ordinary meaning of "use," would be to put the property in the service of the commercial activity, to carry out the activity by means of the property. Here, the royalty obligations in question represent the *revenue*, the *income*, from an allegedly commercial activity. In ordinary usage, we would not say that the revenue from a transaction is "used for" that transaction. For example, in return for an employee's service to his employer, he

generally receives revenue in the form of a salary. It would be strange to say that "The employee uses his salary for his job." He *earns* his salary from his job, but he *uses* it to pay the rent, buy groceries, and so forth. The revenue from a commercial transaction does not have the instrumental relationship to the commercial activity denoted by the phrase "used for;" it is not put in service of that activity, instead it is the end result or income from the activity.

The phrases "integral to" and "related to" plainly mean something different. These are broad phrases that would allow execution on the basis of just about any connection with a commercial activity. The statute specifies a particular kind of relationship, a "used for" relationship. If Congress had intended any relationship to suffice, we would not expect for it to have used the narrower "used for" language.

Furthermore, the structure of the FSIA indicates that the phrase "used for" was intended to have a more specific meaning than what the Bank suggests: if we were to interpret § 1610(a) in the way suggested by the petition, we would have to interpret away an obvious difference in the phrasing of two different parts of the FSIA. The FSIA deals separately with immunity from jurisdiction (§ 1605) and immunity from execution (§ 1610). Although each of these sections creates a "commercial activity" exception from immunity, Congress phrased the two "commercial activity" exceptions very differently. Section 1605(a)(2), concerning immunity from jurisdiction, provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States *in connection with a commercial activity* of the foreign state elsewhere; or upon an act outside the territory of the United States *in connection with a commercial activity of the foreign state* elsewhere and that act causes a direct effect in the United States;

This section uses the phrase "in connection with" a commercial activity. It allows a plaintiff to pierce a foreign state's immunity for suits based on acts that have any connection with a commercial activity in the United States (or with a commercial activity elsewhere that causes a direct effect in the United States). This phrase, "in connection with," means something like "related to" or "integral to." That is, the phrasing in the immunity section means much the same thing that the Bank wants to assign to the phrasing in the execution section.

Section 1610(a), concerning immunity from execution, does not use the phrase "in connection with." If Congress had intended to allow execution on property that had a "relationship with" or was "integral to" a commercial transaction in the United States, we would expect it to say as much, probably by using the same phrase ("in connection with") as it used in crafting the exception to jurisdictional immunity. Instead, § 1610(a) provides:

> (a) *The property in the United States* of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity in the United States*, shall not be immune from attachment in

> aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if [one of several additional factors applies].

Congress used the more specific phrase "used for a commercial activity" in this section rather than the less specific phrase "in connection with a commercial activity" used in § 1605. If we were to take the Bank's approach, we would interpret away the difference in phrasing between these two sections: the Bank is asking us to ignore an obvious difference in the way these two different immunities have been crafted.

As we previously observed, 299 F.3d 378, 387-89 (5th Cir. 2002), the difference in phrasing between the two "commercial activity" sections stands out especially starkly when viewed against the background of the historical and international law context of the FSIA. Historically, even under the "restrictive" theory of sovereign immunity, foreign sovereigns have enjoyed complete immunity from execution of their property in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983). Moreover, at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action. The Second Circuit's decision in *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984), relied on the international law context of the FSIA in concluding that the FSIA's exceptions to executional immunity were indeed narrower than its exceptions to jurisdictional immunity. The court relied on two principle sources of

international law: the European Convention on State Immunity and the British State Immunity Act. The FSIA and the two European laws were all passed at roughly the same time: the European Convention in 1972, the FSIA in 1976, and the British State Immunity Act in 1978. *Id.* The European Convention did not provide *any* mechanism by which a litigant could execute against a foreign state's property: a judgment creditor had to obtain satisfaction through the foreign state's executive or administrative channels. *Id.*

The British State Immunity Act's provision on immunity from execution more closely parallels the FSIA's: it focuses plainly on the "use" of the property. The Act provides:

> (2)(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> . . .
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is *for the time being in use or intended for use for commercial purposes* . . .

State Immunity Act 1978, c. 33, § 13 (Eng.). The British Act's phrasing makes explicit that the mere relationship to a commercial activity does not suffice to permit execution, the property must presently, "for the time being," be "in use or intended for use for a commercial purpose." The British Act's focus in the jurisdictional immunity section, by contrast, is on the "relationship" to commercial activity:

> A State is not immune as respects proceedings *relating to*—
>
> (a) a commercial transaction entered into by the State
>
> State Immunity Act 1978, c. 33, § 3 (Eng.). Thus, the British Act parallels the FSIA: it allows jurisdiction based on mere relationship to a commercial activity, but very clearly permits execution only depending on the "use" of the property.

On the face of the FSIA, the exception to executional immunity is crafted using the more specific "used for" language instead of the broader "in connection with" language. When we place this difference in phrasing against the background of the history of the two forms of immunity in the United States and the international law context of the FSIA, the difference in phrasing stands out even more plainly. We reject the Bank's definition, not only because it does not accord with the plain meaning of the phrase "used for,"[5] but because it would obscure a clearly

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[5] Even the Bank appears to recognize that what matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property in the past. *See Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 21-23 (D.D.C. 1999) (holding that the foreign state's use of the property for commercial activity is necessary for § 1610(a) to apply). Any property the foreign state purchases from a private supplier will necessarily be used for a commercial purpose by that supplier. If a foreign state buys real estate to use for an embassy, for example, the real estate will have been used for a commercial purpose by its former owner. Similarly, an embassy's telephones, cars, and diplomatic housing were all used by some private party at some point for a commercial transaction; that is, the sale to the foreign state. If we were to allow a private party's commercial use of the property to count for § 1610(a), we would erase the commercial/noncommercial use distinction for almost all of a foreign state's tangible property.

intentional difference in the way the two different "commercial activity" exceptions from immunity—executional and jurisdictional—have been phrased by Congress.[6]

IV

Contrary to the Bank's suggestion, assigning the phrase "used for" its ordinary meaning does not make it impossible to execute against the intangible property of the foreign state. The Bank argues that we have improperly assigned a temporal focus to the phrase "used for," that we have focused on the intended use of the property in the future instead of its use in the present or the past. The Bank suggests that, because it is difficult to prove what a foreign state intends to do in the future with intangible property, like bank accounts,[7] judgment creditors

[6] We also reiterate that assigning the phrase "used for" its plain meaning helps accomplish one of the principal goals of the FSIA: to restrain as much as possible judicial interference with the *jus imperii*, or sovereign acts, of a foreign state. *See* H.R. Rep. 94-1487, at 7. Its true that allowing any kind of execution against a foreign state's property will likely have some indirect effect on the state's sovereign acts. If, for example, you execute against the commercially used property of a foreign state's national airline, you will probably damage the profits of the airline. The loss of those profits may, down the line, make it more difficult for the sovereign to supply books to its schoolchildren or send its officials abroad on diplomatic missions. But the impact of a court confiscating some property being used at present for a sovereign purpose is much more direct and immediate: for example, the attachment of a bank account used to pay diplomatic salaries or maintain an embassy would immediately and directly affect the foreign state's sovereign diplomatic activities.

[7] In considering execution against bank accounts, several district court cases have in fact focused on the use of those accounts, not on the source of the money in the account. For example, in *Liberian Eastern Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606 (D.D.C.

will rarely be able to execute against any intangible property.

We clarify that we express no holding as to the temporal aspect of the phrase "used for." In its petition for rehearing, the Bank does not allege any scenario under which the Congo has put its royalty or tax obligations at any point in time in the service of a commercial activity in the United States. That is, it does not claim that the Congo used the property for a commercial activity, within the ordinary meaning of "used for," at any time. Instead, it wants us to interpret the phrase "used for" in a way that goes beyond the ordinary meaning assigned to that phrase. Because the temporal aspect of the phrase "used for" does not seem particularly important to resolving this case on any of the Bank's current theories, we express no opinion on *when* the property must be used for a commercial activity in the United States.

Moreover, we cannot see how focusing on the use of property forecloses execution against intangible property. Our decision in *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989), helps illustrate how certain intangible property can uncontroversially be viewed as used in service of a commercial activity in

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1987), the District Court for the District of Columbia held that bank accounts "utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions . . . including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities" were not "used for" a commercial activity within the meaning of the FSIA. The focus was plainly on how the money from the accounts was spent, not where it came from. Other district court cases have employed similar reasoning. *See Flatow*, 76 F. Supp. 2d at 24 (holding that bank accounts used for the repair and maintenance of noncommercial real estate were not used for a commercial activity and therefore were immune from attachment).

the United States. The Bank cites *Atwood* for the proposition that the panel opinion departs from precedent. To the contrary, *Atwood* demonstrates that the panel opinion is consistent with the way we have interpreted the "used for" requirement in the past.

In *Atwood*, Petrobras, a Brazilian state instrumentality, contracted with Atwood, an American company, to drill oil wells off the coast of Brazil. As security for the sums due Atwood under the contract, Petrobras provided a letter of credit issued by an American bank. When Petrobras refused to pay Atwood, Atwood sued for breach of contract in federal court. Because the letter of credit was due to expire by its own terms, the district court issued a preliminary injunction requiring Petrobras to extend the letter of credit for one year from the date of the order or until all issues pertinent to the letter of credit were resolved. Petrobras appealed, arguing that none of the FSIA's exceptions to immunity from prejudgment attachment, 28 U.S.C. § 1610(d), permitted attachment of the letter of credit. Section 1610(d) provides:

> (d) The property of a foreign state . . . *used for a commercial activity in the United States*, shall not be immune from attachment prior to the entry of judgment in any action . . . if—
>
> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment . . . and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

This section, like § 1610(a), includes the phrase "used for a commercial activity in the United States." In *Atwood*, we concluded that Petrobras had contractually waived any immunity from prejudgment attachment and affirmed the district court.

Although *Atwood* did not explicitly consider the "used for" requirement, Petrobras plainly used the letter of credit for a commercial purpose within the ordinary meaning of the phrase "used for." Petrobras used the letter of credit to secure the services of an American corporation to do drilling work. As we explained in the panel opinion, "what matters is not how [the foreign state] made its money, but how it spends it." In *Atwood*, the letter of credit did not represent the income or the revenue from the commercial transaction, as the royalty and tax obligations do here. Rather, Petrobras put the letter of credit in service of the commercial activity, it "spent" the letter of credit on that activity. On the record before us, by contrast, the Congo has not put its intangible property in the service of any commercial activity in the United States. The panel's definition of "used for" is therefore fully consistent with our having permitted the prejudgment attachment in *Atwood*.[8, 9]

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[8] The Bank's petition cites a sentence in *Atwood* out of context for the proposition that any intangible property "contemplated by" a commercial transaction is thereby "used for" that transaction. *Atwood*'s discussion of the FSIA focused mainly on whether Petrobras had contractually waived its immunity from prejudgment attachment. The relevant contract provided:

> B. *Waiver of sovereign immunity.* The Borrower [Petrobras] acknowledges and agrees that the activities *contemplated by* the provisions of this agreement and the notes are commercial in nature . . . and therefore acknowledges and

(*footnote 8 continued, footnote 9 appears on the following page*)

The *Atwood* case shows how courts can determine, without speculation, that the intangible property of a foreign

> agrees that it is not entitled to any right of immunity on the grounds of sovereignty . . . in any legal action or proceedings arising out of or *relating to* this agreement or the notes.

Atwood, 875 F.2d at 1177 (emphasis added). The phrases "contemplated by" and "related to" in *Atwood* refer to language in the *waiver agreement*, not to language in the statute. The phrase occurs in the text of the *Atwood* opinion immediately after the relevant excerpt from the waiver agreement, in the following context:

> The instant case *relates to* the letter of credit which is an activity *contemplated by* the financing agreement. Accordingly, the *waiver provision* applies . . .

The phrase "contemplated by" in *Atwood* refers to the scope of Petrobras's waiver of immunity, not to the "used for" requirement of § 1610(d). That the royalty and tax obligations at issue here may have been "contemplated by" the joint venture with the American oil companies does not mean that those obligations are used by the Congo for that joint venture.

[9] Moreover, our definition of "used for" corresponds to the way that district courts have dealt with execution against foreign state bank accounts (a form of intangible property). Those courts have focused on the use of the accounts rather than on the source of the money in the account. For example, in *Liberian Eastern Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606 (D.D.C. 1987), the District Court for the District of Columbia held that bank accounts "utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions . . . including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities" were not "used for" a commercial activity within the meaning of the FSIA. The focus was plainly on how the money from the accounts was spent, not where it came from. Other district court cases have employed similar reasoning. *See Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 24 (D.D.C. 1999) (holding that bank accounts used for the repair and maintenance of noncommercial real estate were not "used for" a commercial purpose and therefore were immune from attachment).

state is used for a commercial activity in the United States. In this case, for example, the royalty and tax obligations would be used for a commercial activity in the United States if the Congo used them as collateral for loans obtained from United States banks. There is nothing so inherently speculative about the use of intangible property that courts cannot meaningfully ascertain how such interests are used by the foreign states that own them.

V

Finally, our focus on the use of a foreign state's property does not in any way conflict with the Supreme Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607, 112 S. Ct. 2160, 119 L.Ed.2d 394 (1992), which explored the meaning of the phrase "commercial activity" in the FSIA. Nothing in the panel opinion concerns the definition of "commercial activity": we assume for the sake of argument that the joint venture with the American oil companies was indeed a "commercial activity." Instead, we focus on the phrase "used for," a phrase nowhere found in the jurisdictional commercial activity exception discussed in *Weltover*. The *Weltover* court summarized its holding as follows:

> [W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign govern-

> ment is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

Id. at 614, 112 S. Ct. 2160 (internal citations omitted). *Weltover* holds that we may not refer to the purpose of a sovereign state's activity in classifying its *activity* as commercial or noncommercial. Here, to the extent we have looked to purpose at all, we have looked to the purpose of the *property*, not the purpose of the *activity*. *Weltover* has nothing to say about the definition of "used for," and nothing in that opinion commands or suggests that "used for" denotes anything other than its ordinary meaning.

VI

We interpret statutes according to their plain meanings. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989). In ordinary usage, we would not say that someone uses the revenue or income of a transaction for that transaction. The Bank uses a number of phrases to describe the relationship of the royalty and tax obligations to the allegedly domestic commercial activity: the obligations are "contemplated by" the activity, they are "necessary to" or "integral to" the activity, they are "related to" the activity. All of these relationships plainly differ from the relationship demanded by the statute: a "used for" relationship. Accordingly, we remand to the district court to determine how the Congo uses its royalty and tax obligations. How these obligations were

generated is of no account under the plain language of the statute.

This appeal comes to us on a motion to dismiss. As such, there is little factual development in the record about how the royalties and tax obligations are used. We therefore vacate the dismissal of the garnishment action, which was based on the district court's conclusion that the oil joint venture between the Congo and the garnishees was not "commercial activity in the United States." Even assuming that the district court was correct in this conclusion, that would tell us only how the royalties and tax obligations were generated, not how they are used. We remand to the district court for further consideration of the dispositive factual question, what the royalty and tax obligations are "used for."[10] If it turns out that the royalties and tax obligations are not used for any commercial activity in the

[10] Our decision to vacate the dismissal of the garnishment action obviates the need to reach two additional issues argued on appeal: whether Texas law permitted the district court's award of attorneys' fees and whether the Bank was entitled to additional discovery. Consideration of the attorneys' fees issue would be premature at this time. Under Texas law, "where the [garnishee's] answer is contested, the costs shall abide the issue of the contest." Tex. R. Civ. P. 677. Because we do not yet know how the "issue of the contest" will be resolved, it is too soon to consider any attorneys' fees issues.

With respect to discovery, the district court may on remand limit any additional discovery to facts relating to the immunity determination. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998). Even with respect to the immunity issue, the district court should order discovery "circumspectly and only to verify allegations of specific facts crucial to [the] immunity determination." *Arriba Ltd.*, 962 F.2d at 534. The scope of discovery on exceptions to foreign sovereign immunity is a matter of the district court's discretion. *Kelly*, 213 F.3d at 849.

United States, the district court should dissolve the writs of garnishment and dismiss the action.

VACATED and REMANDED for further proceedings not inconsistent with this opinion.

DENNIS, *Circuit Judge*, Concurring in vacating the district court's judgment and remanding the case for further proceedings but disagreeing in part with the majority opinion as to the controlling principles of law:

> The pertinent provisions of the FSIA are:
>
> § 1610. Exceptions to the immunity from attachment or execution
>
> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver,

1.

In my opinion, the district court erred in failing to recognize that, in the loan agreement upon which the Bank's

judgment against the Congo is based, the Congo explicitly waived its immunity from execution, as follows:

> (C) The Borrower consents generally in respect of any suit, action or proceedings arising out of or in connection with this Agreement to the giving of any relief, or the issuance of any process in connection with any such suit, action or proceedings including, without limitation, the [taking], enforcement or execution against any property whatsoever (irrespective of its use or intended use) of any order or judgment that may be made or given in such action or proceedings.
>
> (D) To the extent that the Borrower may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid or execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed) the Borrower agrees not to claim and waives such immunity to the fullest extent permitted by the laws of that jurisdiction intending, in particular, that in any proceedings taken in New York the foregoing waiver of immunity shall have effect under and be construed in accordance with the United States Foreign Sovereign Immunities Act of 1976.

There can be no reasonable doubt that the Congo thereby explicitly waived its immunity from execution of the judgment entered against it in New York in favor of the Bank in accordance with the FSIA § 1610(a)(1).

2.

Under the undisputed facts, the property executed upon—the garnishees' intangible obligations to pay royalties—are in the United States, as required by FSIA § 1610(a). The garnishees are oil companies headquartered in Texas. The situs of a debt is the situs of the debtor in Texas. *Mo., Kan. & Tex. Ry. Co. of Tex. v. Swartz*, 53 Tex. Civ. App. 389, 115 S.W. 275, 276 (1908, no writ); *See also*, *Alliance Bond Fund v. Grupo Mexicano De Desarrollo*, 190 F.3d 16, 25 n. 9 (2nd Cir. 1999). The fact that the obligations to pay royalties may be satisfied, after their seizure at the election of the seizing judgment creditor, either by money paid in Texas or by oil delivered in the Congo, does not change the fact that the property executed upon—the oil companies' obligations to pay royalties—is located in Texas at the situs of the debtors' headquarters.

3.

The oil companies' obligations to pay royalties are property of the Congo being used for commercial activity in the United States in accordance with FSIA § 1610(a).

The FSIA defines "commercial activity" as:

> [E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial nature of an activity shall be determined by reference to the nature of the course of conduct, rather than by reference to its purpose. 28 U.S.C. § 1603(d).

The Supreme Court held in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119

L.Ed.2d 394 (1992) that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." Because FSIA § 1603(d) requires that an act's commercial character is to be determined by reference to its "nature" rather than its "purpose," the issue "is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Id.* Instead, the question is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* (quoting Black's Law Dictionary 270 (6th ed. 1990)) (emphasis in the original). "[I]f the activity is one in which a private person could engage, it is not entitled to immunity." *Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981). The Congo entered a joint venture with American, Canadian, and Congolese companies to promote and conduct exploration and development of oil and gas from the Atlantic Ocean offshore of the Congolese coast. The Congo's objective was to obtain within the framework of the joint venture the cooperation and assistance of qualified and well-known oil companies in the exploration and development of the minerals under the best conditions of effectiveness. The joint venture agreement provided for the payment of mining royalties to the Congo. The companies agreed to provide the Congo with all geological information which could be useful in the exploitation of mineral substances. The companies agreed to jointly install and operate facilities of pipelines to pump out the mineral production. The companies agreed to consult and evaluate the construction of a hydrocarbon

refinery in the Congo. The bank alleges, and the Congo does not dispute, the facts that the American oil companies pursued the joint venture as a commercial activity and provided a wide range of services, including management, planning, accounting services and direction in the United States; and the facts that the garnishees' presence in Texas has been continuous, and that it is from Texas that they have supervised, directed, and financed the activities that have given rise to their obligations to make royalty payments.

In *Weltover*, bond holders brought a breach of contract action against Argentina arising out of Argentina's unilateral rescheduling of the maturity dates for payment on certain government bonds. 504 U.S. at 609-10, 112 S. Ct. 2160. A unanimous Court concluded that Argentina did not enjoy immunity from suit for its actions. The Court concluded that the issuance of the bonds was "commercial activity," and that the unilateral extension of the bonds' maturity dates by presidential decree was an act made "in connection with" that activity. *Id.* at 617, 612, 112 S. Ct. 2160. Rejecting Argentina's argument that the issuance of the bonds was not commercial activity because the bonds were issued for a sovereign purpose, the Court explained: "it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.* at 617, 112 S. Ct. 2160 (emphasis in original).

In the present case, the Congo engaged in commercial activity by entering into a joint venture with American oil companies and others for the purpose of discovering and extracting oil and gas. A "joint venture" is by definition a "business undertaking by two or more persons engaged in a single defined project." Black's Law Dictionary 843 (7th

ed. 1999); "shared profits and losses" is one of its necessary elements. *Id.* The joint venture agreement assigned the Congo the right to receive royalty payments on the minerals developed. There is nothing uniquely sovereign about a contract to enter a joint venture to discover and extract oil and gas with specified methods of sharing in profits and losses wherein one of the parties is a mineral owner entitled to receive royalties from production. Like the issuance of the "garden-variety debt instruments" in *Weltover*, "there is nothing about [Congo's action in entering and participating in the joint venture to exploit minerals] that is not analogous to a private commercial transaction." *Weltover*, 504 U.S. at 615-16, 112 S. Ct. 2160. Congo engaged in commercial activity.

The district court concluded that the Congo did not engage in commercial activity because its contract with the oil companies was sovereign in nature and some of its activities were strictly sovereign. The district court relied on dictum in a Seventh Circuit case, *Rush-Presbyterian-St.Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989) ("a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity, since natural resources, to the extent they are 'affected with a public interest,' are goods in which only the sovereign may deal.") (citing and paraphrasing *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) ("government's grant of license to capture and export rhesus monkeys for scientific experimentation not a commercial activity, since the agreement 'concerned Bangladesh's right to regulate its natural resources,' [ ] a uniquely sovereign function")).[1]

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[1] The district court relied on a similar statement in *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D.Tex.1989),

Unlike the situation in *MOL*, however, the Congo's actions did not stop with its initial action as sovereign, in the regulation of its natural resources, to open them to exploitation and development. The Congo went on to step down from its sovereign status and engage in a typical commercial activity, a joint venture contract with oil companies for the exploration, production, and sale on the world market of oil and gas. This is not something that only a sovereign can do. Even if the Congo's initial action in exposing its minerals to development was sovereign and regulatory, "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 607, 112 S. Ct. 2160. *See also*, *Weltover Inc. v. Republic of Argentina*, 941 F.2d 145, 151 (2d Cir. 1991) ("[o]nce a sovereign enters the marketplace as a commercial actor, it should be subject to all the rules of the marketplace.")[2]

Because the Texas oil companies' obligation to pay royalties to the Congo were necessary and integral to, and therefore used for, the joint venture commercial activity conducted, in substantial part in the United States, by the

an alternative or unnecessary ground of the *Jones* decision which was not approved or relied upon by this Circuit in affirming on appeal. *See Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992).

[2] "Foreign sovereigns constantly implement broad programs intended to stimulate their economy or to avoid economic catastrophe. Each of these programs, however, is implemented through numerous individual transactions. To imbue each transaction with a sovereign character simply because it is part of a broader governmental scheme would run afoul of the FSIA's restrictive theory of foreign sovereign immunity." *Weltover Inc. v. Republic of Argentina*, 941 F.2d at 150 (citing House Report at 6605) (immunity for foreign states restricted to public acts of the sovereign).

Congo and the other parties to the joint venture, those royalty obligations fell within the exceptions to immunity from execution provided for by FSIA § 1610(a)(1).

4.

Finally, in my view, the district court erred or abused its discretion in not allowing the Bank to conduct discovery before dismissing its garnishment proceeding. The Bank made a reasonable showing that the garnishees' obligations to pay royalties to the Congo is property of the Congo present in the United States, used for a commercial activity in the United States, and therefore not immune from execution upon an uncontested judgment entered by a court of a State. The district court's dismissal was tantamount to the conversion of a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment without giving all parties an opportunity to present all material made pertinent to such a motion by Rule 56. See Rule 12(b). The Bank's judgment against the Congo is valid and uncontested, and, in my opinion, upon the prima facie showing made by the bank, the Congo's property is squarely within the exceptions to the immunity from execution provided by FSIA § 1610(a)(1). Accordingly, the district court should have allowed full discovery against the Congo, which would have allowed the Bank a fair opportunity to present all available material evidence pertinent to its opposition to the Congo's motion to dismiss or motion for summary judgment. *Cf. First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998).[3]

[3] The cases relied upon by the district court and the majority to deny or limit discovery, *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992) and *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213

Conclusion

Although I agree with much of the majority opinion, I would reverse and remand the case for further proceedings not inconsistent with the reasons herein assigned.

ON PETITION FOR PANEL REHEARING

Per Curiam:

IT IS ORDERED that the Republic of Congo's motion for leave to file its petition for rehearing out of time is GRANTED.

IT IS FURTHER ORDERED that the Republic of Congo's petition for panel rehearing is DENIED. In the petition, the Congo points out that the majority opinion in this case neglected to address explicitly one of the two prongs of analysis under 28 U.S.C. § 1610(a). Section 1610(a) provides that, under certain circumstances, a judgment creditor may execute against the "property in the United States of a foreign state . . . used for a commercial activity in the United States." The majority opinion addressed the second of these clauses, but not the first. That is, it addressed whether the royalty and tax obligations at issue were "used for a commercial activity in the United States," but not whether the obligations were "property in the United States" within the meaning of the statute.

F.3d 841 (5th Cir. 2000) are inapposite because those cases dealt with issues of immunity from suit and liability under FSIA § 1605, rather than asserted immunity from execution under FSIA § 1610, as in the present case.

In our view, this omission does not require any change to the mandate of the majority opinion. The factual question of what the royalty and tax obligations are "used for" appears much less difficult on this record than the legal question of determining the situs of the intangible royalty obligations. Moreover, despite the Congo's arguments to the contrary, we continue to believe that the district court is the appropriate forum to resolve the factual question of how the Congo uses its property.

The petition for panel rehearing is therefore DENIED.

DENNIS, *Circuit Judge* concurring in granting the Bank's petition for panel rehearing, and dissenting from denial of the Congo's petition for rehearing:

I.

I commend the majority opinion for recognizing that we interpret statutes according to their "plain meaning" and turning to the dictionary to determine what that meaning is for the words "used for" in FSIA § 1610(a)(1). Unfortunately the majority chooses to ignore those parts of the definition which do not support its overly-narrow construction of the term.

As the majority itself correctly notes, "used for" can mean "utilize." What the majority omits to mention is that "used for" also means "to put into action or service: have recourse to or enjoyment of: EMPLOY." *Webster's Third New International Dictionary* 2253 (Philip B. Gove ed., 3rd ed. 1993). *See also Black's Law Dictionary* 1540 (Bryan A. Gardner, ed., 7th ed. 1999) ("[t]he application or employment of something"); *Merriam-Webster's Colle-*

giate Dictionary 1301 (Frederick C. Mish ed., 10th ed. 1993) ("avail oneself of: EMPLOY . . . to expend or consume by putting to use"). Thus property is "used for commercial activity" if it is employed in, applied in the service of, or utilized for commercial activity.

The majority not only uses an improperly truncated and cramped meaning of "use", it also mischaracterizes the assets at issue in this case which the Bank seeks to attach. In order to make its argument work, the majority incorrectly describes Congo's royalty interest as "revenue" or "income," *i.e.*, as the results or fruits of the Congo's right to receive royalties rather than the property right itself. On the contrary, however, a landowner royalty interest is an intangible property interest entitling its owner to a share of production, in kind or cash, if, as and when there is production, free of the costs of production. *See* 8 Howard R. Williams & Charles J. Meyer, *Oil and Gas Law* 952 (2001). *See also Jensen v. Wilkinson*, 133 S.W.2d 982, 984 (Tex. Civ. App. 1939) (". . . the usual and customary way for a land-owner to realize on the value of his land for oil is to get it leased, retaining royalty rights, and through such royalty rights to share in the profits which it is hoped will issue from his land in the form of oil production, or to sell such royalty rights or portions thereof to others."); 30 La. Rev. Stat. Ann. § 80 ("A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another. Unless expressly qualified by the parties, a royalty is a right to share in gross production free of mining or drilling and production costs."); John S. Lowe, *Oil and Gas Law in a Nutshell* 43 (1995) ("A landowner's royalty . . . is the interest in production retained by the lessor in the royalty clause of the oil and gas lease.").

A simple analogy helps here. The relationship between a royalty interest and the proceeds from that interest is the same as between shares of stock and dividends owed as a consequence of ownership of shares. Just as a share of stock has existence and value separate from dividends, landowner royalty interest has existence and value as a property interest separate from the payments owed on that interest. *See Jensen*, 133 S.W.2d at 984 (explaining that value to royalty interest prior to oil production comes from "belief that the working interest, which is created by the same-self lease that creates the royalty rights, will be developed and operated"). And while the majority may reasonably think that it would be strange to describe revenue as "used for" the enterprise that created it, it is certainly normal usage to consider shares of stock or royalty interest as "used for" the commercial activity which ultimately generates production and revenue.

The majority thus ignores both the ordinary meaning of "use" and misconceives the nature of the property interest involved here, to arrive at the conclusion that Bank has failed make a showing that the royalty interest is "used for" commercial activity. For these reasons I believe that the majority's analysis is incorrect.

I would reverse the district court's grant of summary judgment, and remand for further proceedings in light of the precepts discussed in my separate opinions.

II.

In denying the Congo's request for an opinion on the situs of the royalty obligations the majority writes, "[t]he factual question of what the royalty and tax obligations are 'used for' appears much less difficult on this record than

the legal question of determining the situs of the intangible royalty obligations."

I cannot comprehend why the difficulty of the situs question allows this court to shirk its duty in guiding the district court on a complex legal determination it may have to make. Such a conclusion is justifiable only by assuming that it is inevitable that the district court will find that the royalty interest is not "used for" commercial activity. If the majority *sub silentio* has already reached this decision, it should forthrightly declare the reasons for its conclusion. Although I likely would disagree with the reasons, they may reveal that the case should not be remanded or provide helpful guidance to the district court if it is remanded.

Upon further research I think that the situs question is one which deserves more attention, and one upon which the district court may need more guidance in answering. Accordingly, I would grant the Congo's petition for rehearing for the purpose of clarifying and setting forth the legal principles controlling the situs determination.

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[stamped] Filed March 16, 2001

No. A 01 CA 100 SS

CONNECTICUT BANK OF COMMERCE,
Plaintiff,

vs.

THE REPUBLIC OF CONGO,
Defendant,

and

CMS OIL AND GAS COMPANY, et al.,
Garnishees.

ORDER

BE IT REMEMBERED on the 26th day of February 2001, the Court held a hearing at which parties were ably represented by counsel of record. Before the Court are Plaintiff's Motion to Extend Time, to Commence Discovery, and for Expedited Review [#9-1,2,3], and Defendant and Garnishees' Motion to Dissolve the Writ of Garnishment and Motion to Dismiss [#5-1,2]. After considering

the case file, the relevant case law, and arguments of the parties, the Court enters the following order.

I. Background

Plaintiff Connecticut Bank of Commerce ("the Bank") is the assignee of a judgment entered in England against defendant Republic of Congo. On January 11, 2001, the Bank brought an action in a New York state court to enforce the England judgment; when Congo did not appear, the New York court granted summary judgment in favor of the Bank and entered an order granting the Bank permission to execute the judgment pursuant to 28 U.S.C. § 1610(c). Then, the Bank filed the New York judgment in the 345th District Court of Travis County to convert the judgment into a Texas judgment. At the same time, the Bank also filed a garnishment action against CMS Oil & Gas Company, CMS Oil & Gas International Company, CMS Nomeco International Congo Holdings, Inc., CMS Nomeco Congo, Inc., CMS Oil & Gas International, Ltd., and CMS Oil & Gas (Congo), Ltd. (collectively, "the CMS garnishees") and Nuevo Energy Company, Congo Holding Company, Nuevo Congo Company, Nuevo Congo International, Inc., and Nuevo International Holdings, Ltd. (collectively, "the Nuevo garnishees") in that court. The purpose of the writs of garnishment was to prohibit the garnishees from paying debts or delivering any property to Congo. Subsequently, defendant Congo and all the garnishees removed the garnishment action to this Court on the basis of diversity jurisdiction.

Defendants aver the CMS Nomeco Congo, the Nuevo Congo Company, and Nuevo Congo Ltd. are successors to the original parties to, and the current owners in interest in, a Convention for oil and gas production in the Repub-

lic of Congo. *See Declaration of Bobby H. Bledsoe*. On the other hand, none of the other CMS garnishees or Nuevo garnishees owe any obligations to the Congo. *Id.* In connection with its oil and gas production activities, CMS Oil & Gas company, a Texas corporation—and not a garnishee in this case—and CMS Nomeco Congo, Inc. are obligated to make withholding tax payments to the Congo on a monthly basis. Also, the Congo is entitled to royalty on production under the Convention. Pursuant to a settlement agreement and amended turnover order entered into by the Congo and the National Union Fire Insurance Company (NUFI), CMS Nomeco Congo, the Nuevo Congo Company, and Nuevo Congo Ltd. current pay a portion of the royalty owed to the Congo directly to NUFI. This arrangement was made in connection to litigation against by NUFI and others against the Congo in federal district court in the Northern District of Illinois in 1991. The remainder of the royalty, i.e., the portion the companies are not paying directly to NUFI, is paid to the Congo in kind based on the latter's election. There is evidence in the record that suggests this in-kind royalty is to deliver barrels of oil produced and stored in the Congo.

II. Discussion

The general rule under § 1609 of the Foreign Sovereign Immunities Act (FSIA) is that assets of foreign states are immune from execution and attachment. One exception, found in § 1610(a)(1), applies when a foreign state waives its immunity from attachment in aid of execution. In this case, the Bank relies on a waiver provision in an agreement between the Bank's alleged predecessor in interest and the Congo. In their motion to dissolve the garnishment and dismiss the case, defendants and garnishees basically

argue that § 1610(a) applies only to property in the United States used in connection with commercial activity. Based on their assertion that neither tax payments owed to the Congo nor in-kind royalty payments fall within this narrow exception, defendants and garnishees contend this Court should dissolve the writ of garnishment and dismiss this case. Along with contesting whether royalty payments or tax obligations fall within the § 1610 exception, plaintiffs argue this Court must enforce the judgment of the New York state court based on the full faith and credit clause of the Constitution. The Court considers these arguments in detail below.

A. Immunity of tax and royalty obligations under FSIA

Defendants and garnishees argue the tax obligations and in-kind royalty payments made to the Congo are immune from garnishment under the FSIA. Section 1609 of the FSIA states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609. This broad immunity extends also to post-judgment garnishments. *See, e.g., Alejandre v. Telephonica Larga Distancia*, 183 F.3d 1277 (11th Cir. 1999). Section 1610(a) enumerates the exceptions to immunity from executions on judgments against a foreign government, as follows:

> the property *in the United States of a foreign state*, as defined in section 1603(a) of this chapter, *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State . . . [if one of the seven statutory exceptions applies].

28 U.S.C. § 1610(a) (emphasis added).[1] The relevant exception in this case is found in Section 1610(a)(1), which states the property described in section 1610(a) is not immune if "the foreign state has waived its immunity from attachment in aid of execution either explicitly or by implication". 28 U.S.C. § 1610(a)(1). In any case, the jurisdiction under FSIA is narrowly tailored to the language of the statute, or an explicit waiver of immunity by the foreign state. *LNC Investments, Inc. v. Republic of Nicaragua*, 115 F.Supp.2d 358, 362 (S.D.N.Y. 2000), *citing Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

Plaintiff contends the Congo waived execution immunity for "any property whatsoever", citing section 19(C) of the Loan Agreement. This broad waiver, plaintiff contends, surely includes tax payments and in kind royalty obligations, even if not referenced by name. While the Court

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[1] Defendants also direct the Court's attention to the legislative history of the FSIA and the Restatement 3rd of the Foreign Relations Law of the United States to underscore the importance of the exception's narrow applicability only to property used for commercial activity in the United States. *See* H.R. Rep. No. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627; *see also* RESTATEMENT (3D) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460(a)(2).

agrees with plaintiff's assertion that a loan agreement between a foreign nation and a private party is enforceable against the foreign state on its terms, the conclusion plaintiff reaches is off the mark. In the portion of the Loan Agreement dealing with execution immunity—Section 19(D)—the Congo waives execution immunity to be *construed in accordance with the United States Foreign Sovereign Immunities Act of 1976.* See Loan Agreement, § 19D (emphasis added). So while plaintiff is correct in arguing that the Congo *could* have waived immunity, the fact is that the Loan Agreement in this case does not reflect the Congo's waiver of execution immunity to an extent that would have rendered the protection of FSIA meaningless.

Even if the Court were to hold that the Congo did waive execution immunity, the plaintiff's contention that the tax and in-kind royalty payments are subject to attachment and execution is flawed. The problem with the plaintiff's argument is that it ignores the clear statutory language of the FSIA. Numerous courts have held that the exception language of Section 1610(a) refers *only* to property used for a commercial activity. *See, e.g., 767 Third Avenue Assoc.'s v. Permanent Mission of Zaire*, 787 F.Supp. 389, 393 (S.D.N.Y. 1992). In *Republic of Argentina v. Weltover*, the Supreme Court discussed the proper scope and meaning of "commercial activity" under the FSIA. 504 U.S. 607 (1992). In *Weltover*, the Court noted FSIA left the term "commercial" largely undefined, but distinguished acts relating to commercial activity—which could be performed by any private party—as opposed to acts relating grounded in truly sovereign authority. *Id.* at 612, 614; *see also Flatow v. Islamic Republic of Iran*, 76 F.Supp.2d 16, 22 (D.C.C. 1999) (holding that the purpose of the FSIA

and considerations of "practicality" dictate a finding that a sovereign's actions are only commercial within the meaning of FSIA only when they are of the kind performed by other private parties).

In this case, the Court agrees with the defendants and the garnishees that neither the tax obligations nor the in-kind royalty payments fit the narrow exception for property used for commercial activity under Section 1610(a) of the FSIA. The Court first considers the tax obligations to the Congo that plaintiff seeks to garnish. It is clear that taxation is a uniquely governmental activity, and not one in which private parties engage; therefore, tax revenues are non-commercial in nature. *See LNC Investments, Inc. v. Republic of Nicaragua*, 115 F.Supp.2d at 365; *see also Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 650 F.Supp. 73 (S.D.N.Y. 1986), *aff'd*, 854 F.2d 1314 (2nd Cir. 1987). Indeed, the *LNC Investments* and *Liberian Eastern Timber* cases both dealt with a broad waiver of immunity from execution similar to the one in this case, but the courts in those cases held the taxes were non-commercial in nature and immune from attachment despite a waiver allegedly to the contrary.

A basic aspect of sovereignty is control over mineral and natural resources, and thus conduct concerning the production and exploitation of these resources is uniquely sovereign in nature. *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F.Supp. 343, 347; *see also International Assoc. of Machinists v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd* 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Therefore, the rights arising from mineral concessions by the Congo are sovereign in nature, and not properly characterized as a "commercial activity" as envisioned by FSIA. *Jones*, 722 F.Supp. at

347; *Rush-Presbyterian-St.Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989). Defendants and garnishees aver that the in kind royalty obligation consists of oil produced and barreled in the Congo, and therefore cannot be characterized as property in the United States used for commercial activity as required by FSIA Section 1610(a). *See Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guaranty Corp.*, 921 F.Supp. 1113 (S.D.N.Y. 1996); *see also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). Keeping in mind the principal of sovereign immunity as protected by FSIA and the fact that the royalty in question has no connection with the United States, the Court holds that the in kind royalty is immune from attachment.

B. Full faith and credit

Plaintiff contends the Congo cannot raise the defense of sovereign immunity under Section 1609 of the FSIA because of the preclusive effect of the New York court order. To support this argument, plaintiff cites a litany of cases dealing with the issues of *res judicata* and collateral estoppel. At the hearing, plaintiff urged the Court to consider the decision of the Second Circuit in *Caribbean Trading & Fidelity Corporation v. Nigerian National Petroleum Corporation*, in which that Circuit held that a court may reject as untimely any assertion of Section 1609 immunity after a foreign state files its initial response. 948 F.2d 111, 115 (2nd Cir. 1991). In the *Caribbean Trading* case, however, the foreign state—Nigeria—appeared in federal district court and contended the court lacked subject matter and personal jurisdiction under FSIA. *Id.* at 113. It was not until its motion for reconsideration, after

the district court had issued a stay and ordered a posting of over $10 million in security, that Nigeria invoked for the first time the shield of sovereign immunity. *Id.* The Second Circuit in *Caribbean Trading* did not, however, expand the types of property subject to attachment beyond the scope of Section 1610(a).

The facts before this Court are quite different. The Congo never appeared in the New York state court proceedings, and plaintiff procured an uncontested order because of the Congo's procedural default. The record reflects no decision by the New York court on the merits of the latent FSIA issues, nor of any attempt by plaintiff to apprise that court that its sweeping order would be in violation of the FSIA. In its initial pleadings in this Court—the first occasion the Congo has filed a responsive pleading in this matter, the Congo has asserted its FSIA sovereign immunity argument. Furthermore, the Court notes the New York order on which plaintiff relies was made "pursuant to 28 U.S.C. § 1610(c)", which authorizes attachment and execution upon judgment *only as referred to in subsection (a) and (b)* of Section 1610. Therefore, the New York court's order is bound by its own terms to the limits of Section 1610(a). As this Court has discussed above, neither the taxes nor the in kind royalty obligations fall within the exceptions of Section 1610(a), and thus the New York order is without effect as to these forms of payment owed to the Congo in this case.

Plaintiff also attempts to use the doctrine of collateral estoppel with regard to the 1991 *NUFI* litigation. *National Union Fire Ins. Co. v. People's Republic of Congo*, No. 91 C 3172 (N.D. Ill. 1991) Specifically, plaintiff argues the *NUFI* defendants argued—and lost—on the position that a sovereign can waive execution immunity only for property

in the United States used for commercial activity, and therefore the Congo and garnishees may not relitigate the issue in this case. The Court disagrees with plaintiff's analysis of the *NUFI* litigation and its preclusive effect—if any—in this matter. In the *NUFI* case, the Congo and the judgment creditor entered into a settlement and stipulated Turnover Order under which the creditor was assigned a portion of the Congo's right to receive in-kind royalties from entities associated with Amoco. The Amoco entities, who plaintiff alleges are the predecessors-in-interest to the garnishees in this case, argued that the *NUFI* court did not have subject matter jurisdiction under FSIA to approve the settlement.

The *NUFI* court held that execution immunity under sections 1609 and 1610 of FSIA is not a subject matter jurisdiction issue, and thus the Congo's waiver of execution immunity in that case was valid, leaving the Amoco entities with no standing to raise the Congo's immunity defense. Unlike that case, the facts before this Court present the issues of a contractual waiver's effect on a creditor's ability to execute—over a sovereign's objection—on property otherwise immune under FSIA sections 1609 and 1610, and the conflict between a contractual waiver and FSIA immunity. The *NUFI* court did not rule on either of these issues, but rather only that the immunity rules of FSIA are not rules of subject matter jurisdiction. In that case, the Congo had waived immunity under section 1609 of FSIA as part of the settlement agreement, but it has not waived immunity in this case. For these reasons, the *NUFI* case is distinguishable and does not preclude the Court from issuing its ruling today.

In accordance with the foregoing, the Court enters the following order:

IT IS ORDERED that Plaintiff's Motion to Extend Time, to Commence Discovery, and for Expedited Review [#9] is DENIED;

IT IS FURTHER ORDERED that Defendant and Garnishees' Motion to Dissolve the Writ of Garnishment and Motion to Dismiss [#5] are GRANTED.

SIGNED this the 16th day of March 2001.

/s/ SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE
DISTRICT COURT
OF DALLAS COUNTY, TEXAS
162ND JUDICIAL DISTRICT

No. 04-10728

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., real party in interest acting on behalf of C. Itoh Middle East E.C. (Bahrain),

Plaintiff,

vs.

CMS OIL AND GAS COMPANY, CMS NOMECO CONGO, INC., THE NUEVO CONGO COMPANY, and NUEVO CONGO, LTD.,

Garnishees.

ORDER GRANTING APPLICATION
FOR WRITS OF GARNISHMENT

This cause came on to be heard on Plaintiff's Application for Writs of Garnishment (the "Application"); and the Court, having duly considered the Application, the supporting materials, and the applicable law finds and concludes that the writs of garnishment which are the subject of the Application should be issued. It is therefore

ORDERED that the oil-related royalty and tax obligations, which are covered by the Application (1) are located in the United States and (2) have been and are used for

commercial activity or purposes in the United States; and it is further

ORDERED that a reasonable period of time has elapsed following the entry of judgment; and it is further

ORDERED that the requested writs of garnishment should issue forthwith and be served on each of the garnishees to whom such writs are addressed; and it is further

ORDERED that this Court shall retain jurisdiction with respect to any subsequent applications for writs of garnishment filed by Plaintiff. For convenience, Plaintiff may file any subsequent applications for writs of garnishment under the same cause of action number as the current matter.

SIGNED this 21st day of October, 2004. at 9:01 a.m.

/s/ [illegible]
JUDGE PRESIDING

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[stamped] Filed November 5, 2004

Case No. A-01-CA-100-SS

AF-CAP, INC.,

Plaintiff,

—VS—

REPUBLIC OF CONGO, *et al.*,

Defendants.

Case No. A-01-CA-321-SS

AF-CAP, INC.,

Plaintiff,

—VS—

REPUBLIC OF CONGO,

Defendant.

ORDER

BE IT REMEMBERED on the 15th day of October 2004, the Court called the above-styled causes for hearing on Af-Cap, Inc.'s ("Af-Cap") "Motion to Enforce Fifth Circuit Ruling" [#90] (filed in A-01-CA-321-SS), and the parties appeared through counsel of record. Before the Court are Af-Cap's "Motion to Enforce Fifth Circuit Ruling" [#90] (filed in A-01-CA-321-SS); "Response of Perenco Oil and Gas (Services) Company f/k/a CMS Oil and Gas (Services) Company to Plaintiff's Motion to Enforce Fifth Circuit Ruling" [#91] (filed in A-01-CA-321-SS); "Response of the Republic of Congo to Plaintiff's Motion to Enforce Fifth Circuit Ruling" [#92] (filed in A-01-CA-321-SS); Af-Cap's "Reply to Response to Motion to Enforce Fifth Circuit Ruling" [#96] (filed in A-01-CA-321-SS); Af-Cap's "Reply to Response of Perenco Oil and Gas (Services) Company f/k/a CSM Oil and Gas (Services) Company to Motion to Enforce Fifth Circuit Ruling" [#97] (filed in A-01-CA-321-SS); Letter Brief by Perenco Oil and Gas (Services) Company f/k/a CMS Oil and Gas (Services) Company [#99] (filed in A-01-CA-321-SS); "Defendant Republic of Congo's Opposition to Plaintiff's Proposed Order, Submitted October 18, 2004, Purporting to Enforce Fifth Circuit Decision" [#100] (filed in A-01-CA-321-SS); "Defendant Republic of Congo's Response to Plaintiff's November 1 and 2, 2004, Letters to the Court and Defendant's Supplemental Opposition to Plaintiff's Proposed Order Submitted October 18, 2004" [#103] (filed in A-01-CA-321-SS); "Statement of Position of CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. Concerning the Fifth Circuit's Mandate" [#133] (filed in A-01-CA-100-SS); "Supplement to Statement of Posi-

tion of CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. Concerning the Fifth Circuit Mandate" [#134] (filed in A-01-CA-100-SS); "Statement of Position of Af-Cap, Inc. Regarding the Fifth Circuit's Mandate" [#135] (filed in A-01-CA-100-SS); "Response of Af-Cap, Inc. to the Supplement to Statement of Position of CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. Concerning the Fifth Circuit's Mandate" [#136] (filed in A-01-CA-100-SS); "Defendant Republic of Congo's Opposition to Plaintiff's Proposed Order, Submitted October 18, 2004, Purporting to Enforce Fifth Circuit Decision" [#138] (filed in A-01-CA-100-SS); and Af-Cap's November 1 and 2, 2004 Letters to the Court (filed in A-01-CA-321-SS and A-01-CA-100-SS). Having considered the parties' submissions, the arguments presented at the hearing, the case files as a whole, and the applicable law, the Court enters the following opinion and order.

I. Background

Af-Cap moves to enforce the ruling of the Fifth Circuit in *Af-Cap, Inc. v. The Republic of Congo*, Nos. 03-50506 and 03-50560 (5th Cir. Sept. 17, 2004). This decision was rendered in connection with Af-Cap's appeal of this Court's judgments in two cases: Case Nos. A-01-CA-100-SS (the "100 Case"), and A-01-CA-321-SS (the "321 Case"). The 100 Case is a garnishment action against CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. (the "Working Interest Owners").[1]

[1] This case involves garnishment writs issued in January 2001. Thus, the only obligations in the 100 Case are the obligations owed as of service of the writs in January 2001 and as of the answer date for the writs in February 2001. Af-Cap acknowledged this aspect of Texas

Those companies own working interests in connection with a convention for the exploration and production of oil and gas off the shore of the Republic of Congo (the "Congo"). On April 7, 2003, this Court dissolved the garnishment writs issued in the 100 Case, and dismissed the 100 Case, on the grounds the obligations of the Working Interest Owners were not subject to garnishment under the Foreign Sovereign Immunities Act ("FSIA").[2] Af-Cap appealed.

On April 7, 2003, this Court dismissed four other garnishment cases, Case No. A-01-CA-154-SS; Case No. A-01-CA-213-SS; Case No. A-01-CA-270-SS; and Case No. A-01-CA-331-SS, brought by the plaintiff on the same basis and dissolved the writs of garnishment in each.

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garnishment law by filing separate garnishment actions in succeeding months, which sought garnishment of the obligations owed as of the dates of service and the answer dates with regard to the writs issued in these subsequent cases. *See* Case Nos. A-01-CA-154-SS; A-01-CA-213-SS; A-01-CA-270-SS; A-01-CA-331-SS; A-01-CA-431-SS; A-01-CA-489-SS; and A-01-CA-497-SS.

[2] Specifically, this Court stated in its April 7, 2003 Order that Af-Cap had not alleged any use of the tax obligations for any commercial activity in the United States. April 7, 2003 Order at 9. With regard to the royalty obligations, this Court found such obligations were not property "used for commercial purposes in the United States" within the meaning of the FSIA. The Court found the Working Interest Owners' obligations were a series of distinct receivables accruing periodically, and that royalty obligations that accrued in the past were extinguished upon the in-kind delivery of the Congo's royalty oil. April 7, 2003 Order at 14-15 & n.9. Since the royalty obligations Af-Cap sought to garnish were discrete receivables that had not come into existence until after the NUFI debt was paid, and since there was no evidence of any use of existing royalty obligations owing to the Congo for commercial activity in the United States, this Court held as a second alternative holding that the royalty obligations were not garnishable under § 1610(a) of the FSIA. *Id.*

Although Af-Cap appealed the judgment in the 100 Case, Af-Cap apparently did *not* appeal this Court's judgments in Case Nos. A-01-CA-154-SS, A-01-CA-213-SS, A-01-CA-270-SS, and A-01-CA-331-SS and so the Court has no occasion to reconsider them here.[3]

The 321 Case is the "judgment case" in which the Republic of Congo removed from state court to this Court the judgment against the Republic of Congo that Af-Cap seeks to enforce. The 321 Case is not a garnishment action, and no garnishees are parties to the 321 Case. In the 321 Case, Af-Cap filed a Motion for Permission to Execute, seeking a determination by the Court pursuant to § 1610(c) of the FSIA that royalty and tax obligations owed to the Republic of Congo were not immune from garnishment under the FSIA. As noted above, the Court determined the royalty and tax obligations were immune from garnishment under the FSIA, which Af-Cap appealed.

The Fifth Circuit consolidated the appeals in the 100 Case and the 321 Case, and on September 17, 2004, a panel quorum issued an opinion reversing this Court and holding "that the district court erred in concluding that the tax and royalty obligations at issue in this case were not used for commercial purposes in the United States" and holding "that the situs of these obligations is the United States." September 17, 2004 Quorum Opinion at 23-24. Having therefore concluded sovereign immunity did not

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[3] Neither Af-Cap nor its predecessor, Connecticut Bank of Commerce, ever filed any motion to consolidate the garnishment actions. Nor did this Court consolidate the actions sua sponte. In particular, this Court's April 7, 2003 Order demonstrates the garnishment cases are independent cases pending under separate cause numbers, and they were not consolidated in the 100 Case. The Court's April 7, 2003 Order was filed independently in each separate case.

protect the royalty and tax obligations, the Fifth Circuit held: "It follows that the district court erroneously dismissed Af-Cap's cause of action and dissolved the writs of garnishment obtained by Af-Cap against the Garnishees." *Id.* at 24.

On September 27, 2004, four days prior to the deadline for filing rehearing petitions, Af-Cap filed a motion to issue the mandate early. On September 29, 2004, the Fifth Circuit granted that motion, without the benefit of any response to the motion, and without any notice of its intention to rule on the motion prior to the deadline for filing of responses to that motion. On October 1, 2004, the Congo and the Working Interest Owners filed their emergency motion for reconsideration of the order issuing the mandate or alternatively, for recall of the mandate, and they also filed that same day their petition for rehearing and petition for rehearing en banc. Resp. [#91], Exs. A, B, & C.

On November 1, 2004, the Fifth Circuit denied the Congo's and the Working Interest Owners' motion for reconsideration of the order issuing the mandate and granted their alternative motion to recall the mandate pending consideration of the petition for rehearing and petition for rehearing en banc. In the same order, the Fifth Circuit granted the petition for rehearing and clarified the nature of its holding:

> Our decision that the Garnishees' intangible obligations to the Congo had been used for commercial purposes in the United States in the past, and thus were subject to garnishment by Af-Cap, was based on the past use of those obligations to settle a debt owed by the Congo to National Union Fire Insurance Company ("NUFI"). We clarify that our opinion should not be interpreted to per-

> mit garnishment of obligations that were not used in the past for commercial purposes in the United States. Thus, to the extent that tax obligations were not used to satisfy the NUFI debt, such obligations cannot be reached by the garnishment proceedings in this case. Instead, the Garnishees' obligations to the Congo are subject to garnishment by Af-Cap only to the extent that those obligations were used in the past to settle the NUFI debt, irrespective of whether the Garnishees and the Congo label those obligations "taxes" or "royalties".

November 1, 2004 Quorum Opinion at 2-3. The Fifth Circuit denied rehearing en banc and a new mandate issued that same day.

II. Af-Cap's "Motion to Enforce Fifth Circuit Ruling" [#90]

Af-Cap has filed a motion in the 321 Case seeking to enforce the Fifth Circuit's decision. Only Af-Cap and the Congo are parties to the 321 Case, yet Af-Cap seeks an order in the 321 Case reinstating writs against the Working Interest Owners and against Perenco Oil and Gas (Services) Company ("POGSC") in the 321 Case (a case in which no writs have ever [*sic*] issued), and an order authorizing issuance of new writs. Af-Cap also seeks a turnover order pursuant to Texas Civil Practice and Remedies Code § 31.002 against the Working Interest Owners and POGSC, with respect to both the royalty and tax obligations.[4] Based

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[4] In its proposed turnover order, Af-Cap requests the Court order, inter alia:

(*Footnote continued on the following page*)

on the Court's review of the Fifth Circuit's rulings, the Court DENIES IN PART and GRANTS IN PART Af-Cap's "Motion to Enforce Fifth Circuit Ruling" [#90] (filed in A-01-CA-321-SS) as follows:

By virtue of this Court's dissolution of all of the writs and dismissal of all of the cases in 2001, and this court's and the fifth circuit's denial of Connecticut Bank's motion for stay pending appeal in 2001, any royalty obligations that were owed pursuant to the subsequently dissolved writs were extinguished by the delivery of royalty oil to the Congo in August 2001. *See Matter of Bohart*, 743 F.2d 313, 321 (5th Cir. 1984) (holding there was no obligation on a garnishee to continue holding property subject to writ of garnishment for the benefit of judgment creditor after the writ of garnishment had been dissolved but before all appeals of the case had been resolved). This Court so found in its April 7, 2003 Order, holding the only royalty obligations potentially subject to garnishment at that time

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"Garnishees will pay to Af-Cap an amount equivalent to the value of any royalty obligations (including but not limited to obligations that are owed for 'wet oil') that accrued between the date of Lifting No. 84 in January 2000 (the last lifting of wet oil) and August 3, 2001. This payment shall be made in cash to a bank account to be designated by Af-Cap." Proposed Turnover Order at 3.

"Garnishees will make all tax payments owed to the Congo as of the date of this Order, and all future tax payments that become owed to the Congo, to Af-Cap until Af-Cap's outstanding judgment with interest is satisfied." Proposed Turnover Order at 4.

"Garnishees CMS Nomeco Congo, Inc. and [POGSC] will pay Af-Cap $504,940.49 plus interest for tax payments made to the Congo between January 17, 2001 an August 3, 2001. This payment shall be made in cash to a bank account to be designated by Af-Cap." Proposed Turnover Order at 4.

were those that came into existence after Lifting 109 in the Fall of 2002. April 7, 2003 Order at 14-15. Accordingly, this Court has already concluded any royalty obligations owed in January or February 2001 are not subject to garnishment in that they have already been satisfied, and the Fifth Circuit did not reject this conclusion. To the contrary, the Fifth Circuit said it accepted all of this Court's factual conclusion. September 17, 2004 Quorum Opinion at 11.

Nonetheless, consistent with the Fifth Circuit opinion there is no immunity under § 1610(a) of the FSIA and Af-Cap is entitled to a writ of garnishment.[5] Therefore, a writ of garnishment shall issue in Case No. A-01-CA-100-SS to CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd.[6]

SIGNED this the 5th day of November 2004.

/s/ SAM SPARKS
SAM SPARKS
UNITED STATES DISTRICT JUDGE

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[5] It is not clear to the Court or to the parties how the Court is to implement the Fifth Circuit's rulings. The Court notes it will be extremely difficult if not impossible for CMS Nomeco Congo, Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. to comply with its obligations under the writ as the debt to be garnished is not an obligation to make cash payments but rather to deliver oil which is held off the coast of Africa to a location in the Congo. It appears the Fifth Circuit is trying to fit a square peg in a round hole.

[6] The parties agree there are no other proper garnishees.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[stamped] Filed October 25, 2004

CIVIL ACTION No.: H-02-4261

FG HEMISPHERE ASSOCIATES, L.L.C.,

Plaintiff,

v

REPUBLIQUE DU CONGO,

Defendant,

and

CMS OIL AND GAS COMPANY, CMS OIL AND GAS (INTERNATIONAL) COMPANY, CMS NOMECO INTERNATIONAL CONGO HOLDINGS, INC., CMS NOMECO CONGO, INC., CMS OIL AND GAS (HOLDINGS), LTD., CMS OIL AND GAS (INTERNATIONAL) LTD., CMS NOMECO CONGO LDC, CMS OIL AND GAS (CONGO) LTD., CMS OIL AND GAS (SERVICES) COMPANY, NUEVO ENERGY COMPANY, THE NUEVO CONGO COMPANY, THE CONGO HOLDING COMPANY, NUEVO CONGO, LTD., NUEVO INTERNATIONAL INC., NUEVO INTERNATIONAL HOLDINGS, LTD., PERENCO INC., PERENCO OIL AND GAS (INTERNATIONAL) COMPANY, PERENCO INTERNATIONAL

(CONGO) INC., PERENCO OIL AND GAS (SERVICES) COMPANY and LANKAN INC.,

Garnishees.

ORDER ON WRIT OF GARNISHMENT

Before the Court is the plaintiff's Emergency Motion to Clarify Order and Abandon Portions of Previously Granted Garnishment against CMS Nomeco Congo, Inc., The Nuevo Congo Company, CMS Oil and Gas Company, and Nuevo Congo Ltd. (the "Garnishees"). The Court has reviewed the Motion and Orders that it is Granted. The Court further Orders that its October 5, 2004 Order issued in this case is Modified and Restated as follows:

The Court has reviewed the application and the defendants' response, and determines that a valid judgment exists against the Republique du Congo that is unchallenged, that the Republique du Congo irrevocably waived immunity with respect to the obligations of the Loan Agreement, and that the waiver extends to any assets, revenues and properties that belong to the Republique du Congo. The Garnishees owe to the Republique du Congo certain royalty obligations under a 1979 Convention for the production of oil. Based on the plaintiff's emergency application for the issuance of writs of garnishment and the Garnishees response thereto, the Court determines that said royalty obligations constitute property of the Republique du Congo located in the United States, which has been used for commercial activity in the United States, therefore, satisfying the requirements of the Foreign Sov-

ereign Immunities Act and enabling the plaintiff to execute on said property.

Therefore, it is Ordered that the plaintiff's application for writs of garnishment is Granted.

Signed this 22nd day of October, 2004.

/s/ KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[stamped] Filed November 1, 2004
Charles R. Fulbruge III
Clerk

No. 03-50506

AF-CAP, INC.,
Plaintiff-Appellant,

v.

THE REPUBLIC OF CONGO,
Defendant-Appellee,

CMS OIL AND GAS CO., ET AL.,
Garnishees,

CMS NOMECO CONGO INC., THE NUEVO CONGO CO.,
NUEVO CONGO LTD.,
Garnishees-Appellees.

Case No. 03-50560

AF-CAP, INC.,
Plaintiff-Appellant,

v.

THE REPUBLIC OF CONGO,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas, Austin.

(Opinion September 17, 2004, 5th Cir., ____ F.3d ___.)

B e f o r e JOLLY and PRADO, *Circuit Judges*.[1]

PER CURIAM:[2]

IT IS ORDERED that Appellee's motion for reconsideration of the Court's order of September 29, 2004, granting Appellant's motion to issue the mandate forthwith is DENIED.

IT IS FURTHER ORDERED that Appellee's alternative motion to recall the mandate pending consideration of the petition for rehearing and petition for rehearing en banc is GRANTED.

IT IS FURTHER ORDERED that the Petition for Rehearing is GRANTED. Our decision that the Garnishees' intangible obligations to the Congo had been used for commercial purposes in the United States in the past, and thus were subject to garnishment by Af-Cap, was based on the past use of those obligations to settle a debt owed by the Congo to National Union Fire Insurance Company ("NUFI"). We clarify that our opinion should not be interpreted to permit garnishment of obligations that were

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[1] This matter is decided by a quorum. *See* 28 U.S.C. § 46(d).

[2] Judge Jones did not participate in the consideration of the petition for rehearing en banc.

not used in the past for commercial purposes in the United States. Thus, to the extent that tax obligations were not used to satisfy the NUFI debt, such obligations cannot be reached by the garnishment proceedings in this case. Instead, the Garnishees' obligations to the Congo are subject to garnishment by Af-Cap only to the extent that those obligations were used in the past to settle the NUFI debt, irrespective of whether the Garnishees and the Congo label those obligations "taxes" or "royalties". We entrust to the sound discretion of the district court the implementation of the clear intent of our opinion. No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED.

IT IS FURTHER ORDERED that Appellee's motion for costs, incorporated in the petitions for rehearing, is DENIED.

IT IS FURTHER ORDERED that the mandate shall issue forthwith.

SO ORDERED.

APPENDIX H

Title 28. Judiciary and Judicial Procedure

PART IV—Jurisdiction and Venue

Chapter 85. District Courts; Jurisdiction

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Chapter 87. District Courts; Venue

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Chapter 89. District Courts; Removal of Cases from State Courts

§ 1441. Actions removable generally

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Chapter 97. Jurisdictional Immunities of Foreign States

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be

decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or

his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees

shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during

which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the

clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the

clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be

entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to

attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

APPENDIX I

CONVENTION

—The People's Republic of Congo
—Congolese Superior Oil Company
—Cities Service Congo Petroleum Corporation
—Canadian Superior Oil Ltd.
—Société Nationale de Recherches et d'Exploitation Pétrolières "HYDRO-CONGO"

May 25, 1979

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EXHIBIT I
Copy of Decree Granting the PERMIT

EXHIBIT II

EXHIBIT III
Depreciation Rates Applicable to the COMPANIES

EXHIBIT IV
I – Payment of Royalty
II – Payment of Corporate Tax

EXHIBIT V
Model of Letter of Guarantee

TRANSLATION

CONVENTION

BETWEEN

The People's Republic of the Congo (hereinafter referred to as the "CONGO"), represented for the purposes hereof by its Minister of Mining and Energy Mr. Rodolphe Adada,

on the one hand,

AND

Congolese Superior Oil Company (hereinafter sometimes referred to as "SUPERIOR"), a Nevada (U.S.A.) corporation with registered offices at 26th Floor, First City National Bank Building, Houston, Texas 77001, United States of America, represented by Mr. Diego O. Giordano-Echegoyen, duly authorized for this purpose,

Cities Service Congo Petroleum Corporation (hereinafter sometimes referred to as "CITIES SERVICE") a Delaware

(U.S.A.) corporation with registered offices at 306 South State Street, Dover, Delaware, United States of America, represented by Mr. Antoine Saadi, duly authorized for this purpose,

Canadian Superior Oil Ltd. (hereinafter sometimes referred to as "CANADIAN"), a corporation incorporated under the laws of Canada, with registered offices at Three Calgary Place, 355 4th Avenue S.W., Calgary, Alberta, Canada, represented by Mr. Robert C. Schrader, duly authorized for this purpose,

Société Nationale de Recherches et d'Exploitation Pétrolières "HYDRO-CONGO" (hereinafter sometimes referred to as "HYDRO-CONGO"), a *société nationale* with registered offices at Brazzaville, represented by Mr. Alphonse M'Boudo-Nesa, duly authorized for this purpose,

hereinafter collectively referred to as the "COMPANIES", and individually "one of the COMPANIES" or the "COMPANY",

on the one hand.

PREAMBLE:

WHEREAS, the CONGO wishes to promote and conduct, under the best conditions of effectiveness, exploration and development of its liquid and/or gaseous hydrocarbon resources so as to enable thereafter exploitation of these resources on the best possible terms; and

WHEREAS, for this purpose, the CONGO wishes to obtain the cooperation of qualified and well-known oil companies in order to have them provide HYDRO-CONGO, within the framework of a joint venture, with assistance

necessary for the implementation of certain hydrocarbon exploration and the development and exploitation of petroleum deposits discovered on the type "A" permit known as "Marine 1" granted to HYDRO-CONGO, which is more fully described below, and on the exploitation permits which may be granted in respect of such exploration permit; and

WHEREAS, the COMPANIES shall carry out their exploration and production activities in accordance with the principles of the petroleum policy of the CONGO as incorporated in this Convention.

NOW, THEREFORE, IT HAS BEEN AGREED AS FOLLOWS:

1. *Definitions*

For the purpose of this Convention, the terms and expressions set forth below shall have the following meanings:

1.01 *Convention*: This Convention between the CONGO and the COMPANIES.

1.02 *Joint Venture*: The joint venture organized by the joint operating agreement for the petroleum works as this term is hereinafter defined in sub-paragraph 1.10 below.

1.03 *Joint Operating Agreement*: The joint operating agreement for the exploration and exploitation of hydrocarbons entered into among the COMPANIES for the exploration and possible exploitation of hydrocarbon deposits on the permit as this term is hereinafter defined in sub-paragraph 1.04 below.

1.04 *Permit*: The type "A" exploration permit known as "Marine 1", referred to in the preamble to the CONVEN-

TION, granted to HYDRO-CONGO for the benefit of the JOINT VENTURE by the Decree, a copy of which is attached as Exhibit I to the CONVENTION, and all its extensions, amendments, variations or renewals, if any, as well as any exploitation permit which may be granted over any part of its surface.

1.05 *Operator*: The COMPANY which is entrusted, on behalf of the members of the JOINT VENTURE, with the petroleum works—as this term is hereinafter defined in sub-paragraph 1.10 below—on the PERMIT, in accordance with the provisions of the JOINT OPERATING AGREEMENT.

1.06 *Hydrocarbons*: Solid, liquid and/or gaseous hydrocarbons discovered and/or produced on the PERMIT.

1.07 *Natural Gas*: Gaseous HYDROCARBONS produced by the COMPANIES on the PERMIT, but excluding condensate which by normal field methods of processing is separated and recovered as a liquid.

1.08 *Liquid Hydrocarbons*: HYDROCARBONS produced by the COMPANIES on the PERMIT, but excluding NATURAL GAS.

1.09 *Affiliated Company*:

1.09.1 Any company in which more than 50% of the voting rights in ordinary shareholders' meetings are held directly or indirectly by one of the COMPANIES;

1.09.2 Any company which holds, directly or indirectly, more than 50% of the voting rights in the ordinary shareholders' meetings of the COMPANIES;

1.09.3 Any company whose voting rights in ordinary shareholders' meetings are subject to more than 50% control by a company which itself holds, directly or indi-

rectly, more than 50% of the voting rights in ordinary shareholders' meetings of one of the COMPANIES;

1.09.4 Any company in which more than 50% of the voting rights in ordinary shareholders' meetings are held directly or indirectly by several COMPANIES or by several companies as described in sub-paragraph 1.09.1 to 1.09.3 above.

1.10 *Petroleum Works*: All the activities, wherever carried out, relating to exploration, development, exploitation, transportation, storage and disposition of HYDROCARBONS in the CONGO or for export.

1.11 *Exploration Work*: That part of the PETROLEUM WORKS which is undertaken with the goal of discovering HYDROCARBON deposits, including the discovery well and appraisal works, undertaken until the day on which the Operating Committee provided for in the JOINT OPERATING AGREEMENT decides, pursuant to Article 5 of the JOINT OPERATING AGREEMENT, that a discovered deposit is commercially exploitable.

1.12 *Development and Exploitation Works*: ALL PETROLEUM WORKS other than EXPLORATION WORKS, including transportation of HYDROCARBONS to the point of lifting by the COMPANIES.

1.13 *Foreign Companies*: The COMPANIES, except HYDRO-CONGO.

1.14 *CFA Franc*: Currency defined in Title II of the "*Convention de coopération monétaire*" between the Member States of the *Banque des États de l'Afrique Centrale* (B.E.A.C.) and the French Republic, as signed in Brazzaville on November 23, 1972.

2. *Purpose*

2.01 The purpose of the CONVENTION and of the Exhibits hereto is to define the conditions of the participation of the COMPANIES in the PETROLEUM WORKS on the PERMIT within the framework of the JOINT VENTURE.

3. *Effective Date—Term—Exploitation Permit*

3.01 The CONVENTION shall be approved by an act having the force of law and shall come into force upon the publication of such act in the Official Journal of the CONGO.

3.02 The CONVENTION is entered into for the term of the PERMIT.

3.03 Each exploitation PERMIT shall have a duration of thirty (30) years.

4. *Beneficiaries*

4.01 The provisions of the CONVENTION shall apply as a matter of law to the COMPANIES and to any assignee of the rights of each COMPANY on the PERMIT, as well as to any company to which the COMPANIES or one of the COMPANIES shall have decided to associate by assigning to such company all or part of their rights and obligations on the PERMIT. However, any assignment must be submitted to the Minister in charge for approval prior to its coming into force.

If the decision of the Minister in charge is not rendered within one (1) month from the notification of the assignment, which approval to the assignment must be sought, such approval shall be deemed not to have been granted.

4.01.1 If the proposed assignee is a company wholly-controlled by the assignor or by the parent company of its group, the authorization of the Minister in charge shall be automatically granted and, in this case, notwithstanding the provisions of paragraph 4.01 above, the authorization shall be deemed granted one (1) month after the request is made. If the proposed assignee is an AFFILIATED COMPANY, the authorization of the Minister in charge shall not be withheld unreasonably or in a discretionary matter.

4.01.2 Any subsequent action which would result in modifying the qualification of the assignee as a company wholly-controlled by the assignor or as an AFFILIATED COMPANY shall be considered as a new assignment and shall be subject, under the same conditions, to the prior authorization of the Minister in charge.

4.01.3 In accordance with the petroleum policy of the CONGO, HYDRO-CONGO shall not assign its participating interest in the JOINT VENTURE unless the assignee is wholly-controlled by the CONGO.

5. *Warranties*

5.01 Subject to the provisions of sub-paragraph 5.01.3 below, the CONGO warrants to the COMPANIES for the term of the CONVENTION, stable legal, financial, mining and economic conditions within which the COMPANIES will perform their activities in the CONGO, as such conditions arise from the laws and regulations in effect on the date of execution of the CONVENTION, and from the terms and conditions of the CONVENTION.

5.01.1 Therefore, the COMPANIES shall not be subject in any area whatsoever to any measure that would represent an aggravation of the situation described in paragraph 5.01 above.

5.01.2 In particular, any measure which would have the effect of either reducing net profits from the activities performed within the framework of the CONVENTION by decreasing gross income or by increasing the operating expenses of the COMPANIES, or generally jeopardizing the execution or the conduct of the PETROLEUM WORKS by restricting the COMPANIES' rights, shall be deemed to constitute an aggravation of the situation for the purpose of sub-paragraph 5.01.1 above.

5.01.3 Nonetheless, changes in labor, safety and environmental protection legislation and income taxation of individuals shall be applicable as a matter of law to the COMPANIES and to their staff, except if such legislation includes restrictions on the COMPANIES' rights concerning the ownership of their property or the free disposal of HYDROCARBONS to which they are entitled under Article 10 of the CONVENTION.

5.01.4 In addition, the COMPANIES shall not be subject to any discriminatory measures, in law or in fact, particularly with respect to the regulation of property or individuals.

5.02 The CONGO warrants to the COMPANIES for the term of the CONVENTION that, with respect to the corporate tax referred to in Article 6 of the CONVENTION, the tax conditions of the performance of their activities in the CONGO pursuant to the CONVENTION shall be governed by the *Code Général des Impôts du CONGO*, by amendments

and regulations thereto and by the CONVENTION. Therefore, the COMPANIES shall not be subject, with respect to their activities in the CONGO under the CONVENTION, to any discriminatory tax measure in relation to the standard provisions applicable to Congolese or foreign companies, except those resulting from the CONVENTION.

5.03 The CONGO warrants to the COMPANIES for the term of the CONVENTION that, pursuant to the *Code Général des Impôts du CONGO*, the mining royalty paid to the CONGO on the quantities of HYDROCARBONS to which the COMPANIES are entitled pursuant to the JOINT OPERATING AGREEMENT shall be fourteen and one half percent (14 1/2 %) for LIQUID HYDROCARBONS and nine percent (9%) for NATURAL GAS.

6. *Taxes*

6.01 For PETROLEUM WORKS, each of the COMPANIES shall be subject only to the mining royalty referred to in paragraph 5.03 and in Article 7 of the CONVENTION and to the corporate tax referred to in Articles 106 to 126 of the *Code Général des Impôts du CONGO*, to the exclusion of any other levy.

6.02 Consequently, each of the COMPANIES shall be exempt, for the PETROLEUM WORKS and for the term of the CONVENTION, from all other taxes and imposts. This exemption includes among others:

6.02.1 The exemption from any customs duty and any importation tax or deposit for all pieces of equipment, material and supplies and spare parts destined for the PETROLEUM WORKS, whether imported directly by the

COMPANY or indirectly by the OPERATOR in the name of the COMPANY or through suppliers or subcontractors.

6.02.2 The exemption from any export duties or taxes applicable to equipment and spare parts for such equipment when such equipment and spare parts have been imported tax-free in accordance with sub-paragraph 6.02.1 above as well as to HYDROCARBONS produced on the PERMIT and belonging to the COMPANY in accordance with Article 10 below.

6.02.3 The exemption from the internal turnover tax, the taxe unique, the tax on transactions and all other indirect taxes relating to the furnishing of goods (material, equipment, spare parts, etc.), services and work of any kind relating to the PETROLEUM WORKS provided for in the CONVENTION, whether such goods, services or work are furnished by the COMPANY, by the OPERATOR, or by contractors, or by suppliers and entities providing such services, working directly or indirectly for the COMPANY.

6.02.4 The exemption from any registration tax (droit d'enregistrement) relating to any deed or instrument of any nature whatsoever to which the COMPANY, or OPERATOR on behalf of the COMPANY, may be a party within the scope of the PETROLEUM WORKS on the PERMIT; relating to any conveyance of ownership or transfer of use to the COMPANY of movables or immovables for the carrying out of the PETROLEUM WORKS; or relating to the insurance contracts to which the COMPANY or OPERATOR on its behalf may be a party, and concerning the PETROLEUM WORKS.

6.02.5 The exemption from any tax or impost relating to the payment of interest or dividend by the COMPANY.

6.03 *Computation of the corporate tax on each of the COMPANIES*

6.03.1 Except for the rules stipulated in this paragraph 6.03, the rules governing the basis and collection of the corporate tax are those fixed by the *Code Général des Impôts du CONGO.*

6.03.2 Each of the COMPANIES shall be subject to the corporate tax, in accordance with the provisions of the *Code Général des Impôts du CONGO*, and if the corporate tax rate prescribed in the *Code Général des Impôts du CONGO* is less than fifty-five percent (55%), to an additional tax equal to the taxable income multiplied by the excess between fifty-five percent (55%) over said corporate tax rate.

6.03.3 The basis for computation of the corporate tax for each of the COMPANIES for its activities performed within the framework of the CONVENTION shall be computed on the basis of the prices set forth in Exhibit II to the CONVENTION. Depreciation shall be computed by each of the COMPANIES in accordance with rules set forth by the *Code Général des Impôts du CONGO*; nonetheless, each of the COMPANIES shall apply, item by item, the rates set forth in the table attached hereto as Exhibit III.

6.03.4 In order to permit the computation of the corporate tax owed by each of the COMPANIES for its activities performed within the framework of the CONVENTION, each COMPANY shall, from the effective date and for the term of the CONVENTION, maintain accounting books in accordance with the rules set forth by the *Code Général des Impôts du CONGO.*

6.03.5 The provisions of Article 109 of the *Code Général des Impôts du CONGO* shall not apply to the COMPANIES.

6.03.6 By exception to Article 116 of the *Code Général des Impôts du CONGO*, the COMPANIES shall not be authorized to deduct from their taxable income for the purpose of the corporate tax interest or agios paid on loans which may be made for the financing of the PETROLEUM WORKS from AFFILIATED COMPANIES. From the date on which the Operating Committee provided for in the JOINT OPERATING AGREEMENT shall have determined, in accordance with the JOINT OPERATING AGREEMENT, that a commercially exploitable discovery has been made, each COMPANY shall be permitted to deduct from its taxable income interest or agios paid on loans made for the financing of DEVELOPMENT AND EXPLOITATION WORKS by financial institutions independent from the COMPANIES, upon presentation by the borrowing COMPANY to the tax authorities of certificates issued by such financial institutions.

6.03.7 The mining royalty referred to in Article 7 below is deductible from taxable income and can in no case be treated as an advance payment toward the corporate tax.

6.03.8 The ten per cent (10%) limit set by the second paragraph of Article 20.I.60 of the *Code Général des Impôts du Congo*, as amended by Article 5 of Law No. 30/74, shall not be applicable to the COMPANIES.

6.04 Remunerations and wages paid to the COMPANIES' personnel based in the CONGO for the performance of the PETROLEUM WORKS shall be subject to taxes on

income in accordance with the provisions of the *Code Général des Impôts du CONGO.*

6.05 The corporate tax is paid by provisional monthly installments in accordance with the procedure set forth in Exhibit IV to the CONVENTION.

7. *Mining royalty*

7.01 The basis of computation of the mining royalty paid in cash or in kind is equal, for each COMPANY, to the value of the HYDROCARBONS lifted by such COMPANY, computed on the basis of the price determined in accordance with Exhibit II to the CONVENTION, less domestic transportation, processing, storage and loading charges as said charges appear from the COMPANY's accounts and constitute tax deductible expenses. The royalty is not due on those quantities of HYDROCARBONS lost or used for the PETROLEUM WORKS.

7.02 The mining royalty provided for in this Article 7 is payable in cash or in kind, at the option of the CONGO.

7.03 The OPERATOR shall communicate to the competent authority of the CONGO the expected date for the first exportation of HYDROCARBONS at least six (6) months in advance, so that this authority can advise the COMPANY or the OPERATOR within five (5) months following receipt of such notification, of the manner of payment of the mining royalty chosen by the Government. The Government shall always be able to modify the manner of payment so elected by notifying the COMPANY, or the OPERATOR acting on its behalf, at least three (3) months in advance. However, the Government shall be deemed to have initially opted for cash payment of the mining royalty.

If, at any time while the Government is taking the mining royalty in cash, the COMPANIES have the opportunity to enter into sales commitments extending beyond a three (3) month period, which commitment could not be satisfied if the Government should decide to take the mining royalty in kind, the COMPANIES may submit the draft of the sales contract to the Minister in charge, who will, at his discretion, approve it or not. If the draft contract is so approved, the mining royalty shall continue to be taken in cash for the duration of said contract.

7.04 The quantity of HYDROCARBONS to which the mining royalty applies shall be measured at the point of delivery, as described in sub-paragraph 10.02.1. The methods for measurements to be used shall be approved by the competent authority of the CONGO which shall be advised of the progress of such operations so as to be able to be represented thereat and to exercise any control it may deem necessary.

Within one month from the end of the period for which the mining royalty is due, each COMPANY, or the OPERATOR on behalf of the COMPANY, shall provide the competent authority of the CONGO with a statement of the quantities of HYDROCARBONS to which the mining royalty applies, including any appropriate supporting documents.

7.05 The mining royalty, whether in cash or in kind, shall be computed and paid on a quarterly basis, in accordance with the conditions set forth below:

7.05.1 The payment in kind of the mining royalty shall be made to HYDRO-CONGO for the account of the CONGO pursuant to the terms set forth in paragraph 4.11

and in Articles 9 and 10 of the JOINT OPERATING AGREEMENT for the allocation to HYDRO-CONGO of the portion of production to which it is entitled. The quantities of HYDROCARBONS to which the CONGO is entitled pursuant to this Article 7 shall be delivered to HYDRO-CONGO during the month following that for which the mining royalty is due.

7.05.2 The payment in cash of the mining royalty shall be made during the month following the end of the calendar quarter for which the mining royalty in cash is due.

7.06 When the mining royalty is elected to be paid in cash, monthly declarations and provisional payments shall be made in accordance with the terms set forth in Exhibit IV to the CONVENTION.

7.07 By virtue of the special characteristics of NATURAL GAS the parties hereto shall consult, in the event NATURAL GAS is discovered, to settle upon the terms for payment in kind of the mining royalty on NATURAL GAS pursuant to the principles set forth in this Article 7.

8. *Foreign exchange*

8.01 The CONGO warrants, for the term of the CONVENTION, to the COMPANIES, to all individuals duly employed by them and to all individuals or entities entrusted by them with implementing or financing the PETROLEUM WORKS or with marketing the HYDROCARBONS that:

8.01.1 The CONGO shall not require the COMPANIES to repatriate the funds arising from export sales of the HYDROCARBONS.

8.01.2 The COMPANIES may pay contractors, suppliers and lenders abroad in foreign currency, using funds maintained abroad by them, in execution of contracts entered into for the performance of the PETROLEUM WORKS.

8.01.3 The COMPANIES may borrow abroad all amounts which they may require to carry out the PETROLEUM WORKS.

8.01.4 The COMPANIES may transfer to suppliers residing outside of the franc zone all amounts owing thereto.

8.01.5 The COMPANIES may freely repatriate from the CONGO to member countries of the franc zone capital originating from these countries invested in the CONGO within the scope of the PETROLEUM WORKS, and may transfer, under the same conditions, the return of such capital, if any.

8.01.6 The COMPANIES may repatriate from the CONGO to countries outside of the franc zone any capital originating from these countries invested in the CONGO within the scope of the PETROLEUM WORKS, and may transfer, under the same conditions, the return on such capital, if any. The CONGO warrants to the COMPANIES that they shall obtain the means of payment to countries outside of the franc zone necessary to carry out the operations contemplated by the CONVENTION.

8.01.7 The COMPANIES may freely export from the CONGO to member countries of the franc zone all amounts which they may owe to suppliers, shippers and other entities providing services, as well as to their shareholders residing in the franc zone, and in general, all amounts which the

COMPANIES may owe in any respect whatsoever during the term of the CONVENTION.

8.01.8 Staff members who are nationals of member countries of the franc zone duly employed by the COMPANIES may freely export from the CONGO to countries of the franc zone any portion of their salaries they have saved.

8.01.9 The COMPANIES may export from the CONGO to countries outside of the franc zone all amounts which they may owe to suppliers, shippers and other entities offering services, as well as to their shareholders residing in these countries.

8.01.10 Staff members who are nationals of the countries outside of the franc zone duly employed by the COMPANIES may export from the CONGO to such countries any portion of their salaries they have saved.

8.02 All currency transfers to or from the franc zone made pursuant to sub-paragraphs 8.01.4, 8.01.6, 8.01.9 and 8.01.10 above shall be carried out under the supervision of the *Bureau des Relations Financières avec l'Etranger* /Bureau of Financial Relations with Foreign Countries/ ("B.R.F.E.") in accordance with the rules in effect in the CONGO pertaining to the franc zone.

8.03 All transactions contemplated by sub-paragraphs 8.01.4, 8.01.6, 8.01.9 and 8.01.10 above shall not be made more onerous for the COMPANIES, through the imposition of different rates or special taxes or commissions, than for other purchasers and sellers of currency in commercial transactions.

9. *Lump sum payments*

9.01 The COMPANY appointed as OPERATOR by the JOINT OPERATING AGREEMENT shall make the following lump sum payments to the CONGO on behalf of the FOREIGN COMPANIES:

9.01.1 Two hundred and fifty million (250,000,000) CFA FRANCS when the daily production of LIQUID HYDROCARBONS on the PERMIT shall have reached thirty thousand (30,000) barrels per day and thereafter averaged thirty thousand (30,000) barrels per day for a period of one hundred and twenty (120) consecutive days; and

9.01.2 Six hundred and twenty five million (625,000,000) CFA FRANCS when the daily production of LIQUID HYDROCARBONS on the PERMIT shall have reached seventy five thousand (75,000) barrels per day and thereafter averaged seventy five thousand (75,000) barrels per day for a period of one hundred and twenty (120) consecutive days.

9.01.3 The lump sum amounts set forth in sub-paragraphs 9.01.1 and 9.01.2 above shall become due thirty (30) days following the expiration of each one of the one hundred and twenty (120) day periods referred to in said sub-paragraphs.

9.02 The amounts set forth in sub-paragraphs 9.01.1 and 9.01.2 above may be capitalized and depreciated for tax purposes by the FOREIGN COMPANIES.

10. *Disposition of HYDROCARBONS*

10.01 Each COMPANY shall have the right to take freely the portion of the HYDROCARBONS to which it is

entitled pursuant to the JOINT OPERATING AGREEMENT. It may freely sell, transfer, transport, consume or export, directly or indirectly, such portion.

10.02 Nonetheless, and by derogation to the principle set forth in paragraph 10.01 above, each COMPANY shall, at the request of the CONGO, affect by priority to the satisfaction of the needs of the Congolese industry, under the conditions defined hereinafter. The HYDROCARBONS derived from its exploitation, provided that: (a) HYDROCONGO's share of production shall have been first used to satisfy the needs of the Congolese industry; and (b) the maximum of the share of production of each FOREIGN COMPANY so affected to satisfy the needs of the Congolese industry shall not exceed thirty percent (30%) of all HYDROCARBONS to which each FOREIGN COMPANY is entitled.

10.02.1 Delivery of the quantities of HYDROCARBONS to which the CONGO is entitled, including the LIQUID HYDROCARBONS destined for the Pointe-Noire refinery, shall be made either at well head or at the gathering point, should the parties to the JOINT OPERATING AGREEMENT decide to build one in accordance with the provisions of said JOINT OPERATING AGREEMENT. In the event deliveries of LIQUID HYDROCARBONS to the CONGO pursuant to this paragraph exceed the CONGO's mining royalty share as provided in paragraph 5.03 above, the sales prices of such excess shall be the weighted average of the prices actually realized by the COMPANIES in sales to non-affiliated purchasers concluded during the calendar month preceding the month during which such LIQUID HYDROCARBON sale to the CONGO took place.

10.02.2 The commitment of each COMPANY to sell a part of its production of HYDROCARBONS from the PERMIT as described in paragraph 10.02 above and at the price defined in sub-paragraph 10.02.1 above is limited for each calendar year to the share of the needs of the Congolese industry for the HYDROCARBONS of the quality required by the Congolese industry equal to the ratio of the portion of the production of HYDROCARBONS of this quality to which the COMPANY is entitled pursuant to the JOINT OPERATING AGREEMENT and the total production of HYDROCARBONS of such quality from the territory of the CONGO for the same calendar year. The CONGO shall notify the COMPANY, before the commencement of each calendar year, of the tonnage required by it for such calendar year pursuant to the commitment set forth hereinabove.

10.02.3 The CONGO may choose the quality which is the most appropriate to its needs among those qualities available, and to the extent to which the OPERATOR determines that it is possible within the framework of the operations contemplated by the CONVENTION, the OPERATOR shall endeavor to furnish to the CONGO the various qualities which the CONGO may request.

10.02.4 The quantities of HYDROCARBONS sold pursuant to the provisions of this Article 10 shall be paid for by the CONGO within fifteen (15) days from the end of the calendar month in which delivery is effected, upon presentation of the pertinent invoice by each COMPANY.

10.03 In the event NATURAL GAS is discovered, the parties hereto shall meet as soon as possible to work out the changes, if any, which may have to be made to this

Article 10 to apply the principles of the CONVENTION to the exploitation of such deposits.

10.03.1 The exploitation, if any, of NATURAL GAS deposits shall be carried out pursuant to the principles which govern the relationship between the members of the JOINT VENTURE.

10.03.2 If the use of NATURAL GAS discovered on the PERMIT is not judged profitable by the members of the JOINT VENTURE pursuant to the provisions of the JOINT OPERATING AGREEMENT, the CONGO shall have the right, directly or through HYDRO-CONGO, to use this NATURAL GAS at its own expense.

In the event the CONGO exercises its right to use NATURAL GAS for its own benefit as contemplated hereinabove, HYDRO-CONGO shall provide at its own expense facilities necessary for the development, exploitation, transportation and processing, including but not limited to, separation, compression or liquefaction, of the NATURAL GAS from the first separator after the point of production, and of sufficient capacity to handle NATURAL GAS. The COMPANIES agree to provide, on terms and conditions to be agreed at that time, such technical assistance and cooperation as may be required by HYDRO-CONGO for the development and exploitation of NATURAL GAS deposits, and for the laying out, construction, operation and maintenance of these facilities. In no event shall the aforesaid activities interfere with the PETROLEUM WORKS of the JOINT VENTURE.

10.03.3 All NATURAL GAS produced on the PERMIT and not used directly for the PETROLEUM WORKS

or pursuant to sub-paragraph 10.03.2 hereinabove, may be burnt off.

11. *Employment and training of personnel*

11.01 In accordance with sub-paragraph 5.01.3 hereinabove, each of the COMPANIES shall be subject to the labor legislation and regulations embodied in the laws relating in particular to general working conditions, the regulation of pay and the prevention of work accidents and work-related illnesses and indemnification therefor, as well as to the laws relating to professional associations and labor organizations. On its part, the CONGO shall not apply to any COMPANY or its personnel any labor and welfare regulation in a manner which may be considered discriminatory in relation to the laws regulating other companies exercising their activity in the CONGO.

11.02 Each one of the COMPANIES agrees to undertake, jointly with other members of the JOINT VENTURE and in proportion to the percentage of its participation in the JOINT VENTURE, for the training, technically and administratively, of the Congolese supervisory employees, foremen and personnel required for the exploitation activities, by organizing apprenticeship programs in the CONGO or abroad, by payment of scholarships for study abroad and by the establishment of professional training centers in the CONGO, in a way commensurate with the magnitude of such activities.

11.02.1 The professional training programs and the budgets therefor shall be approved by the Operating Committee referred to in the JOINT OPERATING AGREEMENT after consultation with the Congolese Government.

11.02.2 Each of the COMPANIES shall jointly with the other members of the JOINT VENTURE, give priority in employment in its facilities and installations to equally qualified Congolese personnel. Each COMPANY shall assure the professional and technical training of said Congolese personnel so as to facilitate their access, at all levels, to jobs commensurate with their abilities.

11.02.3 On the production work sites situated outside or near cities and towns, the COMPANIES shall provide jointly lodging for the workers in normal conditions of hygiene and cleaniless, [*sic*] and shall create, if necessary, the medical, scholastic, athletic and cultural infrastructure corresponding to the normal needs of the workers and their families.

11.02.4 The means provided jointly by the COMPANIES for the application of the provisions of this Article 11 purport to permit the gradual replacement of foreign personnel of the COMPANIES assigned to the PETROLEUM WORKS by Congolese personnel. Therefore, the COMPANIES shall use their best efforts so that, at the expiration of the tenth year from the beginning of the DEVELOPMENT AND EXPLOITATION WORKS, the personnel used by the OPERATOR for the PETROLEUM WORKS in the CONGO include one hundred per cent (100%) of laborers and clerks, eighty percent (80%) of foremen and technicians, and fifty percent (50%) of management and supervisory employees, of Congolese citizenship.

11.02.5 The personnel of Congolese citizenship used by the OPERATOR for PETROLEUM WORKS in the CONGO shall be recruited by the OPERATOR and hired,

at his request, by HYDRO-CONGO which will assign such personnel to the OPERATOR for purposes of being trained by the OPERATOR and, at the end of the professional training period, of employment in the PETROLEUM WORKS. From the end of such professional training period, those members of such personnel whom the OPERATOR will have decided to retain for the PETROLEUM WORKS shall be the OPERATOR's employees for the entire duration of their assignment to the OPERATOR.

12. *Congolese suppliers*

12.01 In carrying out the PETROLEUM WORKS, the COMPANIES or the OPERATOR on their behalf shall give priority to Congolese companies in the acquisition of goods and services where such companies offer quality, quantity, terms of sale, conditions of delivery and related services equal to those available for acquisition of goods and services abroad.

12.02 Notwithstanding the foregoing, and subject to conditions of general applicability which the CONGO may impose, the COMPANIES, or the OPERATOR on their behalf, may freely choose the characters and ships of any registry for their use for whatever purpose. To the extent available, the COMPANIES shall use the Congolese merchant fleet during the term of the CONVENTION if the rates and other conditions offered by such fleet are no less favorable than those offered on the international market.

13. *Supply of information*

13.01 The COMPANIES shall supply the CONGO with all information in their possession required to be commu-

nicated by the Mining Code. On its part, the CONGO may communicate to the COMPANIES information, particulary [*sic*] of a technical nature, which may be useful in the PETROLEUM WORKS. The COMPANIES agree not to divulge this information and these documents to third parties, except as required for the PETROLEUM WORKS, provided that, in this case, a commitment be obtained from the recipient to treat such information and documents as confidential.

13.02 In addition to the information the COMPANIES are required to communicate pursuant to the Mining Code, they shall, without charge, place at the disposition of the CONGO all geological information which may be useful in the exploration for and exploitation of mineral substances within the PERMIT other than HYDROCARBONS. The COMPANY which acts as OPERATOR must notify to the competent Congolese authorities all discoveries made on the PERMIT of mineral substances other than HYDROCARBONS; the COMPANIES shall consult to evaluate the possibility, in view of technical and economic factors, of participating jointly in the exploitation of said mineral substances. The COMPANIES agree not to divulge this information to third parties. The CONGO may freely use any information received under this paragraph if the COMPANIES express their lack of interest or fail to submit within four (4) months from the receipt of the information a proposal acceptable to the CONGO for a specific exploration or exploitation permit covering said mineral substance or substances.

13.03 At the request of the Minister in charge, the COMPANIES will consider all available information concerning possibilities for the exploration for mineral substances in any part of the Congolese territory indicated to them by

said authority and shall consult to evaluate the possibility, in view of technical and economic factors, of participating jointly in the exploration for the said mineral substances.

14. *Transport and treatment of products*

14.01 The Minister in charge may request the COMPANIES to participate with other producers in the CONGO in the joint installation or use of facilities or pipelines to pump out all or part of the production of HYDROCARBONS, on the condition that (i) the installation of such facilities or pipelines is technically feasible under normal economic conditions, and (ii) that their use does not jeopardize directly or indirectly the economic profitability of the deposits discovered.

14.01.1 After consultation with the competent Congolese authority, transport rates for pumping out the production shall be established by the companies exploiting the deposits.

14.02 In the event that production permits and a market for finished products is assured, the CONGO may ask the COMPANIES to consult and evaluate, in view of economic conditions and forecasts of profitability, the possibility of constructing a HYDROCARBON refinery in the CONGO jointly with the CONGO and/or other partners approved by the CONGO.

15. *Force majeure*

15.01 In the event that the CONGO or one or several of the COMPANIES finds it impossible, either partially or totally, to perform one or more of their obligations contemplated by the CONVENTION, or arising therefrom, by

reason of *force majeure*, an unforeseeable circumstance (*cas fortuit*) or an occurrence which may be considered as similar to *force majeure* (hereinafter collectively referred to as "FORCE MAJEURE"), the party invoking FORCE MAJEURE shall inform the other parties as soon as possible.

15.02 Said notification shall be addressed in writing either by telex confirmed by letter or by registered letter, return receipt requested, and shall set forth those circumstances which establish FORCE MAJEURE.

15.03 All occurrences independent of the will or control of one or the other party, which the parties cannot reasonably overcome or avoid and whose consequence is to prevent partially or totally or to delay significantly the performance of the obligations of the parties, shall be considered as events of FORCE MAJEURE. For the purpose of the CONVENTION, FORCE MAJEURE shall include but not be limited to: war, serious civil disturbances, insurrection, national strikes and any strikes of a general nature, earthquake, fire, explosion, other catastrophes and all hindrances which result directly or indirectly from orders or prohibitions of a government authority.

15.04 FORCE MAJEURE shall nonetheless not be validly invoked if the events, acts or occurrences in question were reasonably foreseeable or could have been remedied by the exercise of reasonable diligence. FORCE MAJEURE will exist if necessary equipment cannot be found, or can be found only at a prohibitive price. Lack of funds shall not constitute FORCE MAJEURE.

15.05 Time periods for the performance of the obligations of each COMPANY affected by the event of FORCE MAJEURE shall be extended automatically for a term

equal to the delay caused by said FORCE MAJEURE; it being understood (i) that all such extensions shall not give rise to any penalty to the party responsible for performing these obligations, and (ii) that obligations other than those affected by FORCE MAJEURE shall continue to be fulfilled in accordance with the provisions of the CONVENTION.

15.06 In all cases, the party affected shall take, in agreement with the other parties, all appropriate measures to assure the normal resumption of the performance of the obligations affected by FORCE MAJEURE. If, following FORCE MAJEURE, one of the parties is not able to perform its obligations as contemplated by the CONVENTION for a period of three (3) months following the notification contemplated hereinabove, the parties shall meet as soon as possible to examine the consequences of the occurrences in question and in particular the consequences on the time periods for performance of their respective obligations. Should the parties not reach an agreement on said consequences, they shall submit their dispute to arbitration in accordance with provisions of Article 17 below.

16. *Tax declaration and payment*

Each COMPANY shall be responsible for its declaration to the CONGO's tax authorities and for the payment of its taxes arising from its participation in the activities of the JOINT VENTURE in the CONGO on the basis of its net income from all of its activities covered by the CONVENTION.

17. *Arbitration*

17.01 All disputes arising in connection with the CONVENTION between the CONGO on the one hand and any

COMPANY on the other hand which cannot be resolved otherwise amicably shall be finally settled by arbitration in accordance with the rules then in effect of the International Center for the Settlement of Investment Disputes (the "Center") created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States to which the CONGO became a party on October 14, 1966.

17.02 Each party to a dispute shall be entitled to appoint one arbitrator and the arbitrators so appointed shall agree on another arbitrator, if necessary, to achieve an odd number of arbitrators. In the event that agreement upon another arbitrator cannot be reached, such arbitrator shall be appointed by the President of the Center.

17.03 Arbitration shall take place in Geneva, Switzerland. The award which will be rendered in English and French with both texts having equal validity shall be final and binding upon the parties to the arbitration. Judgment upon the award rendered may be entered in any court or other authority having jurisdiction, or application may be made to said court or other authority for a judicial acceptance of the award and an order of enforcement, as the case may be.

17.04 The Center's fees for arbitrating a dispute shall be borne equally by the disputants.

17.05 Any dispute which may arise among the COMPANIES shall be settled in accordance with the arbitration clause of the JOINT OPERATING AGREEMENT.

18. *Applicable law*

The CONVENTION shall be governed by Congolese law.

19. *Notices*

19.01 All notices shall be validly given by mail, cable or telex, addressed to the other party or parties at the address indicated below:

(a) for the CONGO:

Minister of Mines and Energy
Ministry of Mines and Energy
Brazzaville
People's Republic of the Congo

attention:
The Minister

(b) for SUPERIOR:

Congolese Superior Oil Company
P.O. Box 1521
Houston, Texas 77001
United States of America

Telex: 0775369

attention:
Vice-President Exploration

(c) for CITIES SERVICE:

Cities Service Congo Petroleum Corporation
P.O. Box 642
Houston, Texas 77001
United States of America

Telex: 762056

attention:
Vice-President Operations

(d) for CANADIAN:

Canadian Superior Oil Ltd.
Three Calgary Place
355 4th Avenue S.W.
Calgary, Alberta T2P OJ3

Telex: 03826640

attention:
Vice-President Exploration

(e) for HYDRO-CONGO:

Société Nationale de Recherches
et d'Exploitation—HYDRO-CONGO
B.P. 2008
Brazzaville
République Populaire du Congo

Telex: 5220

attention:
The General Manager

All formal notices will be sent by registered mail, return receipt requested, or, if sent by cable or telex, confirmed by registered mail, return receipt requested.

19.02 Each of the parties may change the above address by advising the other parties in writing in accordance with the provisions of this Article 19.

19.03 During the exploration stage, each of the COMPANIES shall designate a representative in the CONGO to whom all formal notices may be validly given. If a com-

mercially exploitable discovery is made, each of the COMPANIES shall establish a branch in the CONGO, duly registered with the Registry of Commerce. By derogation to Article 20 of Law No. 26/62 of June 16, 1962, as amended, the COMPANIES shall not be required to organize a subsidiary company formed under Congolese law.

20. *Amendments*

Amendments may be made to one or several provisions of the CONVENTION, at a party's request, by mutual agreement of the parties.

21. *Guarantee by parent company*

The obligations of the COMPANIES pursuant to this CONVENTION are guaranteed by the parent companies of their respective groups, if the case arises, pursuant to letters of guarantee, a form of which is annexed hereto as Exhibit V.

Done at Brazzaville, on May 15, 1979.

For the People's Republic of the Congo

_____

Rodolphe Adada,
Minister of Mining and Energy

For Congolese Superior
Oil Company

_____

Diego O. Giordano-Echegoyen,
Vice-President

For Société Nationale de
Recherches et d'Exploitation
Pétrolières "HYDRO-CONGO"

Alphonse M'Boudo-Nesa,
General Manager

For Cities Service Congo
Petroleum Corporation

Antoine Saadi,
Vice-President

For Canadian Superior
Oil Ltd.

Robert C. Schrader,
Vice-President,
International Contracts

EXHIBIT I

Copy of Decree Granting the Permit

TRANSLATION

DECREE Nº. 253/79 OF MAY 16, 1979,
granting to HYDRO-CONGO a type "A"
hydrocarbons exploration permit
(known as "Marine 1")

The President of the Central Committee of the *Parti Congolais du Travail*, President of the Republic, Chief of State, President of the Council of Ministers,

— Having reviewed Act Nº. 038/ICT/00 of March 30, 1979, establishing, organizing and regulating Public Institutions;

— Having reviewed Decree Nº. 79/134 of April 4, 1979, appointing the Prime Minister;

— Having reviewed Decree Nº. 79/155 of April 4, 1979, appointing the Members of the Council of Ministers;

— Having reviewed Law No. 29/62 of June 16, 1962, [ILLEGIBLE] of the Mining Code;

— Having reviewed Law No. 34/62 of June 16, 1962, setting the rates and rules for the payment of duties on mining title;

— Having reviewed Law No. 35/65 of August 10, 1965, [ILLEGIBLE] of the Mining Code;

— Having reviewed Decree N°. 68/247 of August 16, 1962, setting forth various conditions of application of Law N°. 25/62 referred to above;

— Having reviewed Government Order N°. 14/73 of June 4, 1973, deciding the creation of Hydro-Congo;

— Having reviewed the permit application introduced by Hydro-Congo on January 13, 1979 under N°. DRF/HC, 000/252/[ILLEGIBLE];

— Having reviewed Decree N°. 79/111 of March 10, 1979 granting the "Autorization personnelle Minière" to Hydro-Congo;

After consultation with the Council of Ministers,

Decrees:

ARTICLE 1

It is hereby granted to Hydro-Congo pursuant to the conditions held in the present Decree a type "A" exploration permit, [ILLEGIBLE] valid for liquid and gaseous hydrocarbons, [ILLEGIBLE] equal to 1,435 (one thousand four hundred and thirty five) kilometers, and [ILLEGIBLE] by:

1. a. The straight lines joining the points 1 and 2, 2 and 3, 3 and 4, 4 and 5, 5 and 6, 6 and 7, 7 and 8, 8 and 9, 9 and 10; these lines are reportedly coincident with the limit separating the renewed "Madingo Maritime (A)" permit and the "Marine 1" permit.

b. The straight line joining the points 10 and 11; this straight line being reportedly partially coincident in part with the limit separating the renewed "Madingo Maritime (A)" permit and in part with the limit separating the "Loango East" concession and the "Marine 1" permit.

c. The straight lines joining the points 11 and 12, 12 and 13, 13 and 14, 14 and 15, 15 and 16, and 16 and 17; these straight lines reportedly coincide with the limit separating the "Loango East" concession and the "Marine 1" permit.

d. The straight lines joining the points 17 and 18, and 18 and 19; these straight lines reportedly coincide with the limit separating the "Loango West" concession and the "Marine 1" permit.

e. The straight lines joining the points 19 and 20, 20 and 21, 21 and 22, 22 and 23, 23 and 24, 24 and 25; these straight lines are reportedly coincident with the limit separating the renewed "Pointe-Noire Grands Fonds (A)" permit and the "Marine 1" permit.

f. The straight line joining the points 25 and 26; this straight line reportedly coincides with the limit separating the "Mer Profonde" permit and the "Marine 1" permit.

g. The straight line joining the points 26 and 1, *i.e.*, a section of the straight line passing on the intersection of the low-tide mark and the limit of the territories of Congo and Gabon in a geographic azimuth of 212°; this straight line is reportedly coincident with the limit separating the territorial waters of Congo and Gabon.

2. The points 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 are defined as follows:

Points	Coordonnées Géographiques Ellipsoide de Clarke 1880		Coordonnées U.T.M. (Clarke 1880) Fuscau 32-Me: 9° E.	
	Longitude EAST	Latitude SOUTH	EAST	NORTH
	Point located at 38 km from the low-tide mark on the straight line defined in paragraph 1.g. above			
1	10°58'14"260	4°14'34"560	718.730	9.530.170
2	11°02'31"668	4°18'29"055	726.652	9.523.560
3	11°05'15"851	4°15'11"228	731.714	9.529.624
4	11°09'50"804	4°15'10"466	740.214	9.529.624
5	11°09'51"271	4°17'56"970	740.214	9.524.508,361
6	11°15'05"727	4°17'56"058	749.914	9.524.508,361
7	11°15'05"241	4°15'09"563	749.914	9.529.624
8	11°23'36"921	4°15'08"018	765.700	9.529.624
9	11°27'26"845	4°18'20"070	772.775	9.523.700
10	11°27'28"782	4°28'12"323	772.775	9.505.500
11	11°16'15"217	4°28'14"496	752.000	9.505.500
12	11°16'15"066	4°27'25"678	752.000	9.507.000
13	11°15'10"219	4°27'25"878	750.000	9.507.000
14	11°15'09"972	4°26'04"513	750.000	9.509.500
15	11°14'21"337	4°26'04"661	748.500	9.509.500
16	11°14'21"191	4°25'15"841	748.500	9.511.000
17	11°10'40"712	4°25'16"499	741.700	9.511.000
18	11°09'55"210	4°24'38"710	740.000	9.512.400
19	11°09'55"600	4°26'54"240	740.000	9.508.000
20	11°07'32"384	4°26'54"636	736.500	9.508.000
21	11°07'53"139	4°31'15"025	736.500	9.500.000
22	11°04'54"774	4°31'15"544	731.000	9.500.000
23	11°04'54"312	4°28'32"796	731.000	9.505.000
24	11°00'46"128	4°28'33"491	723.346,900	9.505.000

25 Intersection of Longitude East 11°00'46"944 meridian and straight line J-K of the original "Pointe Noire Grand Fonds" permit, as defined in Decree No. 68-270/M CAEIM of October 17, 1968.

Point Located 65 km from the low-tide mark on the straight line defined in paragraph 1.g. above.

ARTICLE 2

The minimum work program to be performed on the exploration permit described in Article 1 above is defined in Exhibit 2 hereto.

ARTICLE 3

Hydro-Congo is hereby authorized to become a party in association with the companies executing a convention with the People's Republic of the Congo, for the implementation of the exploration permit described in Article 1 above as well as any exploitation and transportation permits which may derive therefrom.

ARTICLE 4

The exploration permit described in Article 1 above may be renewed for a period of three (3) years in accordance with the conditions set forth in the Mining Code ("*Code Minier*").

The minimum work program to be conducted within the initial period and the renewal period as well as the areas to be relinquished on the exploration permit described in Article 1 above, are set forth in Exhibit 2 hereto.

ARTICLE 5

In the event a discovery of an exploitable reservoir is made on the area of the exploration permit described in

Article 1 above, Hydro-Congo shall request an exploitation permit for hydrocarbons, which shall be granted as a matter of law.

Each hydrocarbons exploitation permit is valid for thirty (30) years. The hydrocarbons exploitation permit may not be renewed.

All matters not defined by the present Decree regarding the hydrocarbons exploitation permit derived from the exploration permit described in Article 1 above are governed by the provision of the Mining Code relating to concessions.

ARTICLE 6

The sub-contractors hired by Hydro-Congo or by any company associated with Hydro-Congo shall comply with the Mining Code.

ARTICLE 7

The Minister of Mines and Energy is hereby entrusted with the implementation hereof which shall be registered, communicated wherever necessary and published in the Official Journal of the People's Republic of the Congo.

Done in Brazzaville on May 15, 1979.

The President of the Central Committee of the *Parti Congolais du Travail*, President of the Republic, Chief of State, President of the Council of Ministers

(s) Denis Sassou-Nguesso
Denis Sassou-Nguesso

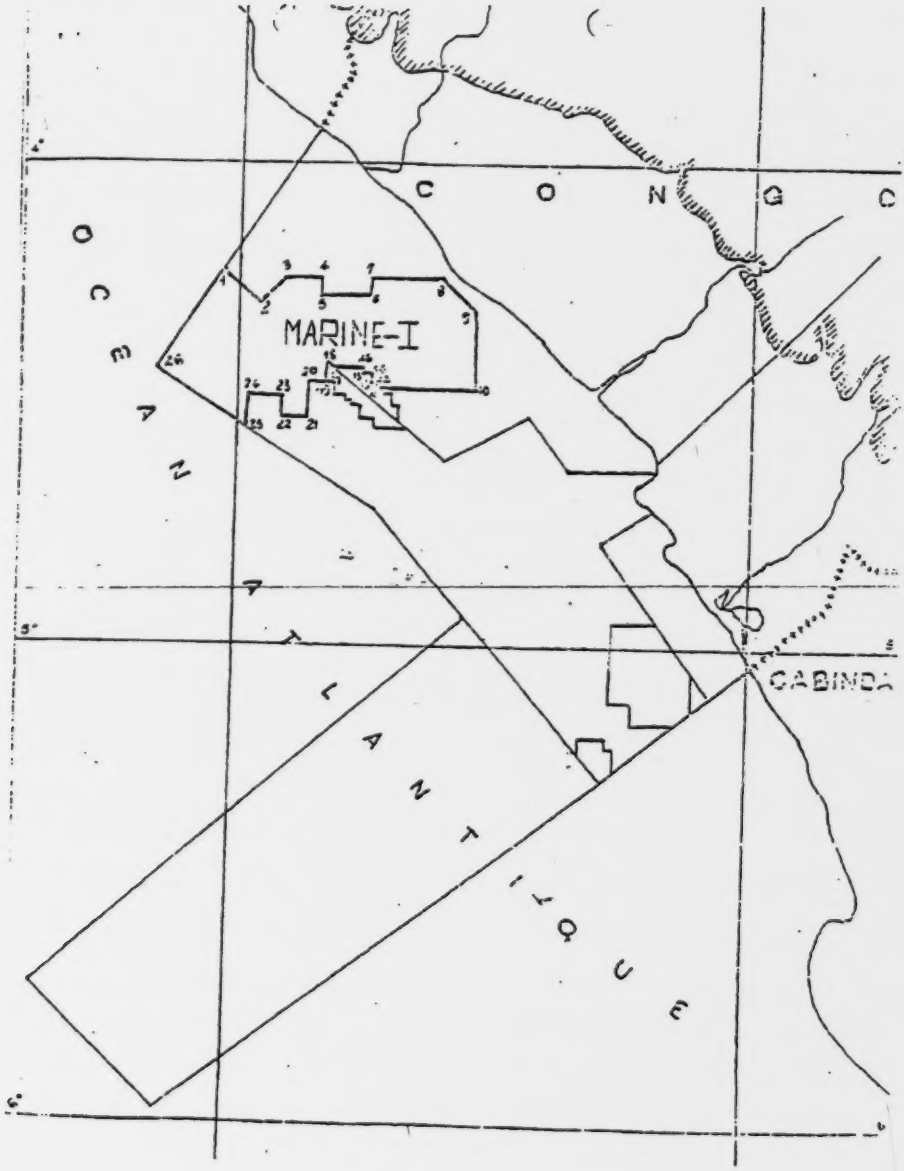
Prime Minister,
[Illegible]

(s) [Illegible]
(s) [Illegible]

By the Minister of Mines

(s) Rodolphe Adada
(s) Rodolphe Adada

EXHIBIT 1
MAP OF THE "MARINE 1" PERMIT



ANNEXE 2

I – Minimum Work Program

A. Initial Period

The term of the first period shall be five (5) years.

Phase I

The term of Phase I shall be three (3) years and shall consist of the following:

(a) One thousand (1000) kilometers of Marine seismic.

(b) Within six (6) months after receipt of the processed data commit to drill a pre-salt test well to be commenced within twenty-four (24) months from the date of signing the Convention within the State, but not later than thirty (30) months from such date, depending upon availability of suitable equipment at competitive rates, or relinquish the entire permit.

(c) The permit holder shall have the option to relinquish the permit at the later of the following two dates: (i) ninety (90) days after completion of the exploration well, or (ii) ninety (90) days before the end of Phase I, or proceed into Phase II.

Phase II

The term of Phase II shall be two (2) years.

During the course of Phase II, the permit holder shall drill two (2) pre-salt exploration wells. The permit holder shall have the option to relinquish the permit upon completion of each well.

B. Renewal period

The exploration permit shall be renewed upon request from the permit holder for a three (3) year renewal period, during the course of which at least three (3) wells will be drilled. However, the permit holder shall have the right to relinquish the permit upon completion of each well.

C. For purposes of paragraphs A and B above, the obligation to drill a well shall be deemed satisfied by the permit holder when the objective depth of formation is reached, or expenses actually incurred for such well shall have reached an amount equal to one hundred and fifty percent (150%) of the estimated cost of such well, as budgeted by the Operating Committee of the Joint Venture to be formed by the permit holder of the Convention with the People's Republic of Congo described in Article 3 of the Decree.

II – Relinquishments

The permit holder shall relinquish the original area as follows:

(a) An area equal to twenty-five percent (25%) of the original contract area shall be relinquished at the end of Phase I of the initial period;

(b) Another area equal to twenty-five percent (25%) of the original contract area shall be relinquished at the end of Phase II of the initial period; and

(c) The remainder of the original contract area shall be entirely relinquished upon termination of the renewal period, except for the area or areas of the permit which are covered by one or several exploitation permits, if any;

(d) Areas of the permit that the Operating Committee of the Joint Venture described above has determined, before the effective date of the relinquishments or the expiration of the renewal period, to cover commercial reservoirs shall be excluded from areas relinquished by the permit holder upon termination of Phase I and Phase II of the first period and upon termination of the renewal period.

EXHIBIT II

The base of calculation of the royalty and corporate income tax shall be the market value of the LIQUID HYDROCARBONS sold.

For the purpose of the royalty, the market value of the LIQUID HYDROCARBONS shall be deemed equal to the FOB Congo reference market value based on Middle East sales calculated as described below.

For the purpose of the corporate income tax, the market value of the LIQUID HYDROCARBONS shall be the realized sales price, provided however that in the case of sales to affiliated purchasers, the sales price shall not be lower than the weighted average realized sales price of the selling COMPANY from third party purchasers for the same period of reasonable quantities of LIQUID HYDROCARBONS of similar quality and gravity, or in the absence of such sales of reasonable quantities to third parties, the sales price shall not be lower than a price equal to the competitive value for the same period of LIQUID HYDROCARBONS of similar quality and gravity.

Calculation of the FOB

Congo Reference Market Value

The FOB Congo reference market value shall be computed by reference to the government sales price for Arab Light crude oil for the applicable period adjusted for freight, gravity, sulfur and other quality differentials.

Definitions

1. "Arab Light" means the crude oil produced in Saudi Arabia and sold at Ras Tanura, of API gravity 34 degrees.

2. "Berri" means the crude oil produced in Saudi Arabia and sold at Ras Tanura of API gravity 39 degrees.

3. "Government Sales Price" ("GSP") means the official state sales price of the Government of Saudi Arabia for the sale of Arab Light or Berri.

4. "AFRA VLCC" and "AFRA LR2" mean the freight costs as determined by the London Tanker Brokers Panel or by any other organization substituted therefor, for shipment in very large crude carriers and large range two tankers, respectively.

5. "SPOT VLCC" and "SPOT LR2" mean the freight costs calculated from the *Average Worldscale Rates for Single Voyage Dirty Fixture* published monthly by H.P. Drewry Ltd., London, in their Shipping Statistics and Economics—SSE Publication and would be a weighted average of Fixtures in the 70,000 - 174,999 Cargo Size DWCT for "SPOT LR2" and 175,000 - 300,000 for "SPOT VLCC", respectively. For the purpose of 2. and 3. hereof, the respective "SPOT VLCC" and "SPOT LR2" freights costs shall be based on the rates published for the month in which LIQUID HYDROCARBONS are lifted.

The FOB Congo reference market value shall be determined as follows:

1. Take the GSP of one barrel of Arab Light crude oil of 34.00-34.09 degrees gravity.

2. Determine the freight per barrel of transporting Arab Light from Ras Tanura to Rotterdam via The Cape and returning from Rotterdam to Ras Tanura via The Cape by dividing the average of the published "AFRA

VLCC" and "SPOT VLCC" freight per ton by the number of barrels of such crude oil per ton.

3. Determine the freight per barrel of transporting LIQUID HYDROCARBONS from Pointe Noire, Congo, to Rotterdam by dividing the average of the published "AFRA LR2" and "SPOT LR2" freight per ton by the number of barrels of such crude oil per ton. Subtract the resulting freight cost from the freight cost determined under 2 above and add the result to the GSP under 1 above.

The amount determined in accordance with the above procedure shall be adjusted upward or downward pursuant to the following quality factors which shall be computed as follows:

1. *Gravity factor*:

   The differential for gravity will be determined as follows:

   (a) Use 34 degrees API gravity for Arab Light.

   (b) Deduct said gravity from the stated gravity of the LIQUID HYDROCARBONS. Any positive result will be added to the FOB Congo reference market value; any negative result will be subtracted from the FOB Congo reference market value.

   (c) Multiply said (b) remainder by ten and obtain a product.

   (d) Multiply the product (c) by the Arab Light quoted value for gravity differential per 0.1 (one tenth) API; the result will be the gravity adjustment.

2. *Sulfur factor*:

(a) *Arab Light and Berri*

(i) Determine the difference in GSP between Arab Light and Berri.

(ii) Determine the amount of (i) difference attributable to gravity by subtracting from such difference the product of the number of 1/10 degrees gravity between the two grades times the gravity differential value per 0.1 (one-tenth) degree API for the two grades.

(iii) Deduct the product (ii) from the difference per (i).

(iv) Divide the remainder per (iii) by the differential number of 0.1 (one-tenth) weight percent sulfur (SWT%) between the two grades. Use 1.8 SWT% for Arab Light and 1.1 SWT% for Berri until revised by mutual agreement.

(b) Obtain the Congo sulfur adjustment by multiplying the difference in number of 0.1 SWT% between the LIQUID HYDROCARBONS sulfur content and the average of the Arab Light and Berri sulfur content by U.S. cents per 0.1 SWT% determined as set forth in sub-paragraph (a) (iv) above.

Such adjustment will increase the FOB Congo reference market value if Congo sulfur is less than said average, and reduce the FOB Congo reference market value if Congo sulfur exceeds said average.

3. *Other quality factors*:

(a) Should the heavy gas oil distilled from LIQUID HYDROCARBONS (meaning that product distilled between the range of the 600 to 960 degrees Fahrenheit cut pursuant to the American Society for Testing Metals—or any organization substituted therefor—distillation procedure) exceed 0.5 Neutralization number (Neutralization number means the number of milligrams of potassium hydroxide required to neutralize the acid contained in one (1) gram of the heavy gas oil), or

(b) Should the heavy gas oil extracted from LIQUID HYDROCARBONS as defined in (a) above, contain over 0.24 parts per million of nickel and copper, or nickel equivalent (calculated by addition of the parts per million of vanadium divided by 4.3, plus parts per million of nickel and copper), or

(c) Should any currently unknown quality factors of the LIQUID HYDROCARBONS appear,

the Parties hereto shall meet to agree on an equitable adjustment of the FOB Congo reference market value determined, pursuant to the foregoing, to the extent those characteristics are of significance.

ANNEX III (EXHIBIT III)

Depreciation rates applicable to the COMPANIES

Type of investments to be amortized	annual rate
subsurface and drilling works	
non-producing wells	50 %
producing wells: in function with the estimated duration of production. If no estimate	12.5 %
Transportation Equipment	
interior pipelines	10 %
exterior pipelines	7.5 %
Drilling Equipment (in general)	10 %
drilling pipe	20 %
drilling tools	20 %
diesel engines	20 %
derrick and drive machinery	20 %
Intangible Costs	
G + G	20 %
Constructions	
permanent buildings, offices, labs, garages, housing, etc.	31/3%
metallic-sided buildings	31/3%
semi-portable constructions without foundation	10 %
portable cabins or other assembled field buildings	10 %
interior workshop facilities	10 %
Office or other furniture	10.0 %
Telephone	15.0 %

Type of investments to be amortized (*continued*)	annual rate
LOADING AND STORAGE INSTALLATIONS	
Storage installations	10.0 %
Except pipe and tube yards	20.0 %
Loading pier	3.1/3%
Loading installations	10.0 %
Floating pipelines	20.0 %
VEHICLES AND ACCESS ROADS	
Civil engineering machines	30.0 %
Automotive vehicles and their trailers	33.0 %
Except fire trucks, workshop trucks, cementing trucks	20.0 %
RIVER TRANSPORTS	
Pinnaces (lighters)	15.0 %
Tugboats, pusher-type tugs, tank-barges, barges	10 %
Access roads to geophysical works and improductive wells	50.0 %
Access roads to productive wells	20.0 %
OTHER FIXED ASSETS	
Water system	10.0 %
Compressed air system	10.0 %
Electricity system	10.0 %
POWER LINES	
Pylons	3.1/3%
Other elements	5.0 %
TRANSFORMERS	
Buildings and fixed plant	5.0 %
Portable plant	10.0 %

Type of investments to be amortized (*continued*)	annual rate
FIXED MACHINES	
Compressors	10.0 %
Compressors at sea	20.0 %
Miscellaneous motors and pumps on land	10.0 %
Miscellaneous motors and pumps at sea	20.0 %
Machine tools on land	10.0 %
Machine tools at sea	20.0 %
Small tools	15.0 %
Fixed laboratory equipment	10.0 %
Mobile laboratory equipment	20.0 %
Topography equipment	10.0 %
Sea camp equipment	50.0 %
Land camp equipment	20.0 %
SPECIFIC OFFSHORE EQUIPMENT	
Drilling barges	20.0 %
Drilling and production platforms	15.0 %
Offshore well equipment	20.0 %
Underwater energy transport cables	20.0 %
Mooring buoys	25.0 %
On-platform equipment	20.0 %
Underwater wellheads and wellhead supports	20.0 %
Gathering lines between wells and storage stations	20.0 %
Main lines	10.0 %
Underwater loading lines	20.0 %

Costs and expenses accumulated by the COMPANIES in connection with EXPLORATION WORKS will be treated in the following fashion: those of such costs and expenses

which relate to the creation of capitalized assets shall be amortized, beginning in the first fiscal year showing a taxable income, in accordance with the depreciation rates set forth above. The other costs and expenses shall constitute "*frais de premier établissement*" (costs of initial installation), which may as such be amortized, at each COMPANY'S option, without time limit.

EXHIBIT IV

I – PAYMENT OF ROYALTY

When the mining royalty is paid in cash, each COMPANY shall, at the latest on the 20th of each month, file a monthly declaration of HYDROCARBONS lifted by it during the preceding calendar month.

Eighty-five percent (85%) of the royalty due for such preceding month of each quarter shall be paid at the time the corresponding monthly declaration is filed. The balance of the royalty due for each quarter shall be calculated and paid at the same time as the monthly declaration made during the second month following the end of the said quarter.

II – PAYMENT OF CORPORATE TAX

Each COMPANY will make prepayment of corporate taxes as follows:

(a) During the course of the first quarter, each COMPANY will estimate the tax it will owe for the current year.

(b) An amount equal to 8/120th of such estimate will be paid on or before the 20th of each of the months of April, May, June, July, August and September.

(c) During the course of the third quarter, each COMPANY will review, on the basis of the actual results of the first semester, the estimate made by it of the annual tax.

(d) An amount corresponding to 8/120th of the new estimate shall be paid at the latest on or before the 20th of each of the months of October, November, December, as well as January, February and March of the following year, the payment for the month of October being however

adjusted in such a way that the total amount of the provisional payments paid on October 20, correspond to 56/120th of the new estimate.

(e) The balance of the corporate tax shall be paid at the time of filing of the annual declaration, and taxes paid in excess, if any, shall be treated in accordance with Article 126 of the *Code Général des Impôts du Congo*.

EXHIBIT V

MODEL LETTER OF GUARANTEE

GUARANTEE

WHEREAS the People's Republic of the Congo (hereinafter referred to as the "CONGO"), Congolese Superior Oil Company, Cities Service Congo Petroleum Corporation, Canadian Superior Oil Ltd., and Société Nationale de Recherches et d'Exploitation Pétrolières—"HYDRO-CONGO" entered into a Convention dated the 25th day of May 1979, for the exploration and exploitation of liquid and gaseous hydrocarbon resources offshore the CONGO (hereinafter referred to as the "CONVENTION"),

and

WHEREAS /_____Name of the parent company_____/ (hereinafter referred to as the "PARENT COMPANY") as owner, directly or indirectly, of all of the shares representing the capital stock of /_____name of the affiliated company_____/ (hereinafter referred to as the "AFFILIATED COMPANY") desires to assure the CONGO of the performance of the obligations of the AFFILIATED COMPANY under the CONVENTION.

ACCORDINGLY,

The PARENT COMPANY hereby agrees and undertakes to provide or cause to be provided to its AFFILIATED COMPANY the funds necessary for it to comply with its obligations under the CONVENTION.

Executed at _____, on _____ 1979

(Name of PARENT COMPANY)

By: _____

(Title)

(2)

Supreme Court, U.S.
FILED
MAR 4 - 2005
OFFICE OF THE CLERK

No. 04-1043

In The Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT AF-CAP, INC. IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In the proceedings below, Af-Cap, Inc. ("Af-Cap") was the plaintiff-appellant. Af-Cap, Inc. is a privately held company and there is no publicly-held company that holds more than 10% of Af-Cap's stock.

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INTRODUCTION

This is a simple commercial collection case against the Republic of Congo ("Congo"), a foreign state that has transformed the practice of commercial debt evasion into a serialized art form that would be the envy of Charles Dickens.[1] After having expressly waived its sovereign immunity and having agreed to consent to any enforcement proceedings against any property of any type located anywhere, Congo has nevertheless litigated this debt and lost in an English court, in a New York court by default, in a federal district court in Texas, twice in the Fifth Circuit, and is now before this Court. Against this backdrop, Petitioners argue that in permitting a judgment creditor (Af-Cap) to execute on its judgment, the Fifth Circuit erred when it referred to state rather than federal law in holding that the *situs* of a debt for garnishment purposes under the Foreign Sovereign Immunities Act ("FSIA") is the domicile of the garnishee. This putative choice of law error, according to Petitioners, led to a result that violates international law, implicates important foreign policy objectives of the United States, creates a split among circuits, and therefore, warrants this Court's attention.

The Writ should be denied for a number of reasons. First, the question presented in the Writ is not presented in this case. Second, there is no circuit split. The Fifth Circuit declined to address the very choice of law issue raised by Petitioners, because it correctly found that federal law, Texas law, and common law were all in accord: the *situs* of a garnished repayment obligation is the

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[1] *See* Charles Dickens, BLEAK HOUSE at Chapter 1 – In Chancery (1853).

location of the garnishee. The Fifth Circuit's decision involved no questions of law that were decided adversely to Petitioners, but rather questions of fact, namely, whether the Congo used its debt property in the United States for commercial purposes. Third, the Fifth Circuit's view that a debt owed to the Congo is located "in the United States" for garnishment purposes is consistent with established law and the holdings of this Court. Finally, Petitioner Congo lacks standing to prosecute this Writ because it expressly waived its immunity and consented to all enforcement proceedings. Petitioner oil companies are collaterally estopped because their predecessor in interest unsuccessfully litigated this issue in another proceeding and further, as stakeholders, their rights can be no greater than the rights of the Congo.

This is not to say that the Fifth Circuit correctly decided all legal issues; it did not. The Court erred when it refused to give full effect to the Congo's waiver of sovereign immunity and required Af-Cap to prove, as it ultimately did, that the property subject to garnishment was used by the Congo for commercial purposes in the United States. *See Connecticut Bank of Commerce v. The Rep. of Congo*, 309 F.3d 240 (5th Cir. 2002). If Congo's waiver of sovereign immunity were to be given full effect, then there would be no need to address the putative issues raised by Petitioners and further, Congo would have no contractual standing to prosecute this Writ: its contractual waiver requires it to

> consent[] generally in respect of any suit, action or proceedings arising out of or in connection with this Agreement to the giving of any relief, or the issuance of any process in connection with any such suit, action or proceedings including,

> without limitation, the making, enforcement or execution against any property whatsoever (irrespective of its use or intended use) of any order or judgment that may be made or given in such action or proceedings.

Loan Agreement at ¶ 19(C) (Dec. 18, 1984).[2] While Af-Cap, as the prevailing party, may not be able to raise that issue as independent grounds for review here, another case involving the same judgment debtor, the Congo, but a different loan obligation, a different creditor and different garnishees does raise that issue on which there is a legitimate circuit split. *See Walker Int'l Holdings Ltd. v. Republic of Congo*, No. 04-20301 (5th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3473 (U.S. Feb. 7, 2005) (No. 04-1071).

STATEMENT OF THE CASE

This case began more than two decades ago, when the Congo executed a Loan Agreement with Equator Bank Limited. To obtain the loan, the Congo pledged as collateral "all of its assets and properties, wherever located," expressly waived any claim of sovereign immunity either from suit, attachment or execution on its property and agreed that it would not defend any such action. *See* Loan Agreement at ¶¶ 19(C), 19(D). It also consented to enforcement proceedings of any type. *See id.*

The Congo defaulted in 1985. Connecticut Bank of Commerce, an assignee of Equator Bank, obtained a

[2] In addition, the Congo expressly waived sovereign immunity under the FSIA. Loan Agreement at ¶ 19(D).

default judgment against the Congo in a London, England court. After negotiations with the Congo proved fruitless, Connecticut Bank filed suit against the Congo in a New York state court. The Congo did not appear and the court entered a default judgment in the amount of $13,628,340.11 in favor of the Bank. The New York court also entered an order of attachment, authorizing the Bank to execute against "any assets or other property of the Congo of any nature, irrespective of the use or intended use of such property . . . including any . . . payments or obligations due to the Congo from any oil and gas exploration and development companies. . . . "

On January 11, 2001, the Bank registered the New York judgment in a Texas state court and obtained a writ of garnishment directed to a group of Texas oil companies, now Petitioners, that were indebted to the Congo. *See* Pet. App. at 54a. These Texas oil companies were assignees of an original contract between Amoco and the Congo, under which Amoco agreed to explore and develop Congo's oil reserves for commercial purposes and share the proceeds, as royalties, with the Congo. The Congo and garnishees removed the case to federal court and moved to dismiss the garnishment actions. The district court dismissed the writs, the Bank appealed and the Fifth Circuit reversed and remanded, instructing the lower court to determine whether the property, namely the obligation to pay royalties, had been or was being used by the Congo for commercial purposes in the United States. The Fifth Circuit expressly declined to give effect to the Congo's contractual waiver of sovereign immunity holding that under the FSIA, 28 U.S.C. §§ 1609-1610, "[e]ven when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets

these two statutory criteria [in section 1610]." *Connecticut Bank of Commerce v. The Rep. of Congo*, 309 F.3d at 247. On remand, the district court again dismissed the writ. On appeal, the Fifth Circuit again reversed, holding that the property at issue for garnishment purposes is the debt owed by the Texas oil companies to the Congo and that debt had been used by the Congo in the past for purely commercial purposes in the United States, namely to satisfy another creditor. *See National Union Fire Ins. Co. of Pittsburgh, PA. v. The People's Rep. of the Congo*, No. 91 C 3172 (N.D. Ill. Dec. 5, 1991) ("*NUFI*"). Petitioners seek this Court's review of the Fifth Circuit's most recent decision.[3]

REASONS FOR DENYING THE WRIT

I. The Question Presented by Petitioners is not Present in this Case

Petitioners seek review of the following question: "Do the immunity exceptions from attachment and execution under § 1610(a) of the FSIA, which are limited to property that is 'in the United States,' reach a foreign sovereign's property rights in its own natural resources within its own territory?" That issue is not present in this case. The Fifth Circuit did not address, let alone resolve, the location of the Congo's natural resources. It did not have to. The primary questions before the Fifth Circuit were the *situs*

[3] On remand, the district court again dismissed the writs of garnishment, and instead, issued a turnover order in Af-Cap's favor. Petitioners have indicated that they intend to appeal that turnover order thereby raising a question whether this case is ripe for review at this time.

of the garnishees' debt obligation to the Congo and the character of that obligation, *i.e.*, commercial or non-commercial. That debt obligation (including the right to specify both the manner and place of payment), was correctly characterized by the Fifth Circuit as intangible property. *See* Petition at 9-10, *citing* Pet. App. 89a-90a. Af-Cap did not seek and the Fifth Circuit did not order attachment of any of Congo's oil or Congo's ownership interest in that oil. The purported circuit split involving the application of state versus federal law also is distinct from the question presented by Petitioners and therefore does not satisfy the "circuit split" requirement of Rule 10(a) of this Court.

II. There is No Circuit or State-Federal Split

The Petition rests on a fundamental misreading of the Fifth Circuit's opinion. Far from holding that the *situs* of a debt for garnishment purposes is governed by state, rather than federal law, the Fifth Circuit found it unnecessary to address the "choice of law" issue posited by the Congo because, whether applying state law, federal law or common law, the result was the same – the *situs* of a debt, for execution purposes, is the location of the debtor or garnishee, as the case may be. *See* Pet. App. at 17a-19a. (noting that the laws of Texas, New York, Montana, and Wyoming are in accord with each other and with the rule recognized by the Supreme Court in *Harris v. Balk*, 198 U.S. 215, 221-22 (1905) (holding that State law governs garnishment and that situs of a debt is wherever the garnishee can be found)).[4] Thus, where, as here, the Congo

[4] Nor is it unprecedented or even arguably improper for a court to employ this method of comparing federal, state and common law in

(Continued on following page)

entered into a commercial arrangement with a Texas company in which the Texas company became indebted to the Congo, then a judgment creditor of the Congo can garnish the debt owed by the Texas company to the Congo in a federal court located in Texas. There is nothing cataclysmic about this post-judgment remedy and certainly nothing that implicates any interest other than the commercial interests of the Congo. After all, this is a case solely about money. The only unusual aspect of the case is that the legal issue spot-lighted by Petitioners is devoid of controversy – every court, whether state or federal, agrees that the *situs* of a debt for garnishment purposes is the location of the debtor.

Without a real issue, there can be no circuit split and there is none here. Petitioners attempt to create a split by contrasting "act of state doctrine" cases, where the focus generally is on the asset side of the debt, with this garnishment case, where the focus always is on the obligation side of the debt. It is axiomatic that every debt is simultaneously an asset in the hands of the creditor and a liability in the hands of the debtor. *See Chicago, Rock Island & Pac. Ry. v. Sturm,* 174 U.S. 710, 714 (1899) (noting that the "right of a creditor and the obligation of a debtor are correlative but different"). Courts, both federal and state,

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order to identify a unifying principle and rule. To the contrary, it follows Supreme Court precedent in other contexts. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982) ("It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive issues at hand."); *see also* Fed. R. Civ. P. 69 (specifying that proceedings on or in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held).

agree that whether the "asset side" or the "obligation side" will control depends entirely on the purpose of the inquiry. *See id.*

Petitioners' reliance on act of state doctrine cases to create their ersatz circuit split is misplaced for a variety of reasons. First, the act of state doctrine has nothing to do with FSIA immunity and even less to do with garnishment proceedings. The act of state doctrine does not apply to commercial arrangements such as this one. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 690 (1976). In any event, under the act of state doctrine, "the courts of one [nation] will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns *within their own borders*, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2254 (2004) (emphasis supplied). Where a foreign state confiscates property, for example, the key question is the location of that property. If the property is located wholly within the foreign state, then the act of state doctrine might apply and preclude an action in United States courts. If it is located outside that country, then the doctrine does not apply. However, "the [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations." *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985). Whether the asset side or obligation side will predominate in any given case is heavily fact and policy dependent making those cases highly inappropriate for synthesizing general propositions of law. But, even in the policy-intensive act of state arena, courts in most cases have concluded the location of a debt is with the debtor. *See e.g., Menendez v. Saks and Co.*, 485

F.2d 1355, 1364-65 (2d Cir. 1973), *rev'd on other grounds, sub. nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682; *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 716 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). The cases Petitioners rely upon to create the so-called circuit split are all act of state doctrine cases where the *situs* of the asset, as opposed to the *situs* of the obligation, was of significance and where that *situs* was determined "pragmatically" using commonsense. *See Tchacosh Co., Ltd.*, 766 F.2d 1333 (holding that for act of state purposes, confiscation by Iranian government of unliquidated contractual claims for services performed in Iran and payable only in Iran, occurred in Iran); *F. & H.R. Farman-Farman Consulting Eng'rs Firm v. Hazra Eng'g Co.*, 882 F.2d 281 (7th Cir. 1989) (holding that for act of state purposes, confiscation by Iranian government occurred in Iran); *cf Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (holding that for act of state purposes, *situs* of certificate of deposit and hence of the debt was the debtor bank in Mexico and therefore, confiscation was complete in Mexico). Petitioners presented no post-judgment remedy case and no case involving the FSIA.

Second, this Court repeatedly has emphasized that the FSIA and the act of state doctrine are separate and distinct – one is a creature of the Congress, the other is a creature of the courts. *See Republic of Austria v. Altmann*, 124 S.Ct. at 2254-55 (recognizing a sharp difference between FSIA jurisprudence and the act of state doctrine); *F. Hoffmann-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. ___, 124 S.Ct. 2359, 2371 (2004) (declining to analogize from act of state doctrine to other areas); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1125 (5th Cir. 1985) (noting

that "the balance struck in regard to each doctrine [act of state *versus* FSIA] may be different."). This case involves the execution in aid of judgment provisions of the FSIA and not the act of state doctrine; therefore, one must examine, as the Fifth Circuit did in this case, the *situs* of the obligation for garnishment purposes and not the *situs* of the debt for tax, escheat, or act of state purposes. Under federal law, state law, and common law, the *situs* of a debt for garnishment purposes is the domicile or location of the debtor, not the creditor. This has been settled law since the late-19th century and Petitioners point to nothing in the FSIA or elsewhere that would indicate otherwise. *See Harris v. Balk,* 198 U.S. at 222-23, 225; *Chicago, Rock Island & Pac. Ry. v. Sturm*, 174 U.S. at 715-16.

Petitioners attempt to muddy the waters, by focusing on the so-called tangible property, *i.e.*, oil, that is responsible for generating the royalties due to the Congo. However, Af-Cap is not attaching those assets, but rather is garnishing the intangible debt owed by the garnishees to the Congo. Other courts under similar circumstances have had no difficulty placing the debt in the United States for garnishment purposes, notwithstanding the location of the oil that is used to create the debt. Indeed, the Congo expressly authorized a perpetual garnishment by a United States court against this very debt. *See NUFI*, *supra* at 5.

III. The Fifth Circuit's Construction of the Term "in the United States" is Consistent with this Court's Precedent

Petitioners also argue that certiorari ought to be granted because the Fifth Circuit's interpretation of the phrase "in the United States," in 28 U.S.C § 1610, conflicts with this Court's decision in *Argentine Rep. v. Amerada*

Hess Shipping, 488 U.S. 428 (1989), and that situs of the Texas companies' debt to the Congo ought to be the Congo, because the oil that generates the debt is pumped off-shore the Congo and not in the United States. Petitioners' argument fails for at least three reasons. First, *Amerada Hess* does not deal with the location of intangible property such as a debt, but rather focuses on the location of a ship destroyed in a military attack on the high seas. Second, Petitioners' argument that the Fifth Circuit decision affecting commercial undertakings is at odds with international law is nothing more than a backdoor assertion that the act of state doctrine should govern commercial activities. This Court, though, has consistently rejected that notion and it was not pursued by Petitioners in the Fifth Circuit. And third, Petitioners' argument would effectively repeal by implication section 1610(a) by precluding virtually all garnishment actions in aid of judgment since the foreign state creditor is, by definition, always located outside the United States.

A. *Argentine Republic v. Amerada Hess Shipping* is Not Relevant

In *Amerada Hess Shipping*, a Liberian tanker transporting fuel oil between two United States' ports was attacked on the high seas and severely damaged by Argentine forces. At the time, hostilities existed between Argentina and Great Britain over the ownership of the Falkland Islands. The owners of the ship and the fuel oil sued Argentina under the Alien Tort Statute and under principles of admiralty law. Argentina asserted immunity from suit under the FSIA. In response, the plaintiffs argued that the FSIA did not grant immunity with respect "to noncommercial torts occurring in the United States,

§ 1605(a)(5)." *Id.* at 439. Plaintiffs argued that although the ship was 5,000 miles from the United States at the time of the attack, United States admiralty jurisdiction nonetheless extended to the high seas and therefore, the tort occurred in the United States. The Court rejected this strained interpretation adopting instead, the normal reading of the term "in the United States." There is nothing in *Amerada Hess* to suggest, imply or even hint that where intangible property is involved, the normal rules to ascertain its *situs* ought not to pertain. To the contrary, the *Amerada Hess* Court used the normal rules of commonsense to determine that the *situs* of a ship 5,000 miles from the United States was not in United States waters for tort purposes. *Amerada Hess* does not provide any reason to grant this petition.

B. The Fifth Circuit's Determination that a Debt is Located in the United States for Garnishment Purposes is Consistent With the Holdings of this Court and Does Not Implicate the Law of Nations

Petitioners suggest a special rule for ordaining the location of intangible property for FSIA purposes. To do otherwise, Petitioners argue, would be inconsistent with international law, the law of nations, and by implication, the act of state doctrine. Petitioners provide no citation for this rather remarkable proposition, as none exists. To the contrary, this Court has consistently held that commercial disputes involving sovereign states do not implicate the law of nations and that the "act of state doctrine [does not apply] to acts committed by foreign sovereigns in the course of their purely commercial operations." *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. at 706.

C. Petitioners' Argument Would Repeal By Implication Section 1610

In Petitioners' view, the foreign state should be allowed to decide the *situs* of any debt owed to it. Aside from ignoring established United States law to the contrary and inviting fraudulent manipulations by scofflaw foreign governments such as the Congo,[5] Petitioners' interpretation effectively precludes garnishment under 28 U.S.C. § 1610(a), because intangible property in the form of a debt would never be located in the United States. Statutes are never interpreted to be self-repealing, yet that is precisely the interpretation championed by Petitioners. Petitioners "encounter head-on the 'cardinal rule . . . that

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[5] The Congo suggests that the post-judgment remedy sought by AfCap would undermine the efforts of the IMF and World Bank to restructure its debt. Petition at 26-27. Even if relevant, which it is not, there is nothing in the record to support it. Moreover, for the past twenty-one years, the Congo has refused to negotiate this debt even when it was held by the United States government in 2002, through the Resolution Trust Corporation, as receiver for Connecticut Bank of Commerce. Finally, its description of the IMF's policy ignores that although the IMF recommended some restructuring, at the time of the Fifth Circuit's decision in 2004, the IMF expressly declined to assist the Congo because the Congo had failed to implement changes to improve its economic and governmental transparency. The IMF had concluded that the Congo's government was more "corrupt" than other similarly situated nations and more "corrupt" than other nations in "sub-Saharan Africa." *See* International Monetary Fund, Republic of Congo: Selected Issues and Statistical Appendix, IMF Country Report No. 04/231 at 31 (July 2004). Of course, the FSIA was designed and enacted by Congress to eliminate precisely these types of political considerations. *See Williams v. The Shipping Corp. of India*, 653 F.2d 875, 878 (4th Cir. 1981) (paraphrasing H.R. Rep. No. 1487, 94th Cong. 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. and Admin. News 6604, 6631, 6634, and noting that the FSIA "depoliticizes the issue of sovereign immunity and places on the judiciary the responsibility of deciding whether in a given case a foreign sovereign is entitled to immunity.").

repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (citations omitted); *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (holding that "interpretations of a statute which would produce absurd results are to be avoided").

IV. None of the Petitioners Has Standing to Pursue this Writ

Perhaps the most intriguing aspect of this Petition has nothing to do with its merits, and everything to do with whether the Congo or the garnishees even have the legal authority to pursue a writ of certiorari. In the Loan Agreement, the Congo explicitly agreed to allow "enforcement or execution against any property whatsoever (irrespective of its use or intended use)." Loan Agreement at ¶ 19(C). Having waived its right to challenge a writ of garnishment against any property, it has waived its right to seek review in this Court. As this Court has consistently noted, rights, whether constitutional or governmental, can be waived. A party, for commercial or other purposes, "may waive any provision [of the Constitution]." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), *quoting Shutte v. Thompson*, 15 Wall. 151, 159 (1873) (First Amendment rights); *Rust v. Sullivan*, 500 U.S. 173 (1991), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (Fourth, Fifth and Sixth Amendment rights), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (right to trial in court). Correspondingly, a government can waive "a sovereign power through contract," and that is precisely what the Congo has done in this case. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). *See also Frew v. Hawkins*, 540 U.S. 431 (2004)

(reaffirming that a state can waive its Eleventh Amendment rights); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Whether the FSIA precludes such a waiver, as the Fifth Circuit held in this case and in *Walker Int'l Holdings*, or permits such a waiver, as the Second Circuit held in *Caribbean Trading v. Nigerian Nat'l Petroleum*, 948 F.2d 111 (2d Cir. 1991), *cert. denied*, 504 U.S. 910 (1992), is the central issue raised in Petition for Writ of Certiorari in *Walker Int'l Holdings*. If the Congo has waived its right to object to the garnishment, then too have the garnishees since they are mere stakeholders and lack an independent interest.[6]

Moreover, the garnishees have litigated this precise issue and lost, and therefore are collaterally estopped from pursuing relief here. In *NUFI*, *supra* at 5, Amoco, the garnishees' predecessor-in-interest, challenged a turnover order directing Amoco to pay over to a judgment creditor of the Congo royalty payments under the same agreement that binds the Congo and the garnishees in this case. *See* Pet. App. at 144a-200a. The court, in upholding the turnover order, concluded that "the immunity rules in §§ 1609 and 1610 for execution upon foreign state property are not rules of subject matter jurisdiction. Immunity under § 1609 may be waived. It has been waived by The Congo." Slip op. at 8. The court went on to hold that the garnishee lacked standing "to raise any immunity defense under § 1609." *Id.* at 10. Since it has already been determined

[6] The Congo not only waived its immunity in the Loan Agreement, but it waived its immunity again when it allowed a default judgment authorizing execution to be entered against it by the New York state court. The district court and then the Fifth Circuit failed to give this judicial waiver full faith and credit.

that the garnishee Petitioners lack standing to raise FSIA defenses, principles of non-mutual collateral estoppel preclude them from raising the same issue here. *See United States v. Mollier*, 853 F.2d 1169, 1175 n.7 (5th Cir. 1988) ("[T]he principle of non-mutual collateral estoppel is that if a litigant has fully and fairly litigated an issue and lost, then third parties unrelated to the original action can bar the litigant from re-litigating that same issue in subsequent suit."). Therefore, the garnishee Petitioners lack standing[7] to prosecute this writ which is premised on FSIA immunity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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[7] In *Walker Int'l Holdings*, one of the questions presented is whether garnishees lack representational standing where the foreign state has waived its immunities under the FSIA and declined to participate in the proceedings.

(4)

No. 04-1043

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IN THE

Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement is at page ii of the Petition for a Writ of Certiorari.

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Petitioners submit this Reply to the Brief of Respondent Af-Cap, Inc. in Opposition ("Opp.") to Petition for a Writ of Certiorari ("Pet.") and to Respondent's Supplemental Brief.

1. The Decision Below Directly Raises The "Situs" Issue Which This Court Should Resolve

Respondent Af-Cap, Inc. ("Af-Cap"), asserts that Petitioners' Question Presented is not "present in this case" because "[t]he Fifth Circuit did not address" and "did not have to" address "the location of the Congo's natural resources," as the property at issue is intangible, not the oil itself physically located in the Congo. Opp. at 5. This is wrong. The Question Presented clearly identifies the property at issue as the Congo's "right to receive" its royalty share of oil in Congolese territory, to which the Fifth Circuit erroneously ascribed a situs "in the United States" for purposes of § 1610(a) of the FSIA.[1]

Af-Cap's argument that the relevant property is "the garnishees' debt obligation" and not "Congo's oil or Congo's ownership interest in that oil," Opp. at 6, attempts to obscure the ineluctable fact that the Congo's royalty rights and the Garnishees' royalty obligations are the same "prop-

[1] Af-Cap's question "whether this case is ripe for review," Opp. at 5 n.3, is unwarranted. If this Court reverses, the district court's final judgment dismissing the case will be reinstated. This Court commonly reviews cases in this procedural posture, particularly ones decided under the FSIA. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). This Court need not await further proceedings on the merits below because whether the Congo's property is "in the United States" under § 1610(a) was recognized by the Fifth Circuit to be a threshold question of law. Petition Appendix ("Pet. App.") 89a, which is ready now for review by this Court. If the property is not "in the United States" the case can proceed no further.

erty." The Fifth Circuit had to determine the situs of the Congo's intangible property to decide whether it is "property in the United States" under § 1610(a) of the FSIA. This Petition seeks review of the Fifth Circuit's erroneous resolution of that question.

This federal law question raised in the Petition implicates crucial foreign relations interests of the United States. The Fifth Circuit's decision harms U.S. foreign policy objectives with respect to direct investment by U.S. businesses in developing countries through "cooperative relationships that create the right economic and political incentives,"[2] particularly in the energy sector. *See* Pet. at 25-26. The Fifth Circuit's decision creates incentives to exclude U.S. businesses from these "cooperative relationships," undermining foreign policy objectives. The Solicitor General recently expressed analogous concerns regarding what it and this Court viewed as an interpretation of the Foreign Trade Antitrust Improvements Act that applied the statute extraterritorially,[3] creating disincentives to international cooperation with the United States and harming foreign policy interests.[4]

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[2] Overseas Private Investment Corporation, *Private Sector Investment in Development* 2 (July 31, 2004), http://www.opic.gov/Mission/AspenAug08.doc.

[3] *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, No. 03-724, 2004 WL 234125, at **29-30 (Sup. Ct. Feb. 3, 2004).

[4] Af-Cap's assertion that its claim was held by the United States government is misleading. *See* Opp. at 13 n.5. In 2002, the FDIC (not the Resolution Trust Corporation) closed the Connecticut Bank of Commerce ("CBC"), the previous named plaintiff in this action, and, as receiver, reassigned the claim to Af-Cap. Af-Cap has always been the beneficial owner of the claim it purchased in 1996, but retained CBC as its debt manager to bring this litigation on its behalf and appear to be a U.S. commercial bank rather than an offshore shell company.

2. The Decision Below Cannot Be Reconciled With *Amerada Hess* And *F. Hoffmann-LaRoche*

Af-Cap's attempts to reconcile the decision below with *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), are unavailing. Af-Cap fails to refute the relevance of *Amerada Hess's* construction of the term "in the United States"—meaning "within the territorial jurisdiction of the United States"—to the situs of the Congo's intangible rights in its natural resources and ignores the Court's reasoning altogether. In *Amerada Hess*, in construing § 1605(a)(5) of the FSIA, the Court "appl[ied] 'the canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 488 U.S. at 440. Section 1605(a)(2) provides an immunity exception for suit based on certain activity "outside the territory of the United States." No such language is used in § 1605(a)(5), which only refers to torts "in the United States." The Court therefore concluded that "Congress' decision to use explicit [extraterritorial] language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." *Id.* The Court reasoned that if Congress had intended § 1605(a)(5) to apply "outside the territory of the United States," it would have provided for this explicitly, as it did in § 1605(a)(2).

Indeed, the third clause of § 1605(a)(2) is the **only** immunity exception that refers to actions or property "'outside the territory of the United States.'" *See id.* at 441 (citing 28 U.S.C. § 1605(a)(2)). By contrast, the provision at issue here, § 1610(a), contains the term "in the United States" twice, applying only to a foreign state's "property in the United States," and excepting from immunity only that portion of such property that is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a).

The Fifth Circuit's decision disregarded this limitation imposed by *Amerada Hess* by extending the term "in the United States" to permit attachment of the Congo's right to property within the Congo's exclusive territorial jurisdiction and control.[5] *See* Pet. at 13-15.

Nor can Af-Cap reconcile the conflict with this Court's longstanding rule, exemplified by *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), that to avoid "unreasonable interference with the sovereign authority of other nations," "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Id.* at 2366 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804)).

Af-Cap tries to obscure the international law violations engendered by the Fifth Circuit's decision by claiming that this case is merely a "commercial dispute" that does not implicate the Congo's sovereignty. Opp. at 12. But this action is not a dispute about the Congo's commercial debt under the 1984 loan agreement with Af-Cap's predecessor-in-interest. The question is whether § 1610(a) permits Af-Cap to execute its judgment on that debt against the Congo's sovereign right to collect its royalty share of oil in Congolese territory. The Congo's sovereignty is directly implicated: there is "no doubt" that the Congo's "issuance of a license permitting the removal of [its mineral resources] . . . is a sovereign act" and its royalty rights under the concession and Congolese law are "'goods in which only the sovereign may deal.'" *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (citation omitted); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989) ("a con-

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[5] 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 511-12, 513, 516 §§ C(1), C(1)(g), C(6) (Rudolf Bernhardt ed., 2000).

tract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity.") (emphasis in original). The Fifth Circuit's construction of the FSIA appropriates the Congo's rights to exploit its natural resources in violation of international law, and is thus irreconcilable with this Court's decision in *F. Hoffmann-LaRoche*.

3. The Decision Below Conflicts With The Decisions Of This Court And Other Circuit Courts

Af-Cap defends the Fifth Circuit's adoption of an inapposite state law rule for determining the situs of the Congo's property by contending that the court "correctly found that federal law, Texas law, and common law were all in accord" and that the situs rule is always "the same—the *situs* of a debt, for execution purposes, is the location of the debtor or garnishee, as the case may be." Opp. at 1, 6.[6] This is incorrect: the Fifth Circuit relied for its situs determination on a rule from Texas, Montana and New York state garnishment law, and saw no need for a different rule under the FSIA. Pet. App. 19a-21a. It thereby disregarded the body of case law establishing the substantive federal standard to be used when it is necessary to determine the situs of property as between the United States and another country. *See* Pet. at 20-21 (citing case law).

Af-Cap's contention that this Court's prior "federal law" decisions in *Harris v. Balk*, 198 U.S. 215 (1905) and *Chicago, Rock Island & Pacific Railway v. Sturm*, 174 U.S. 710 (1899), support the result below is also incorrect. The hold-

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[6] Af-Cap asserts that "The Fifth Circuit's decision involved no questions of law that were decided adversely to Petitioners, but rather questions of fact." Opp. at 2. This is clearly wrong: the Fifth Circuit held that "[b]ecause we find no clear error in the district court's material factual findings, the question before this court is **a strictly legal one**," and "the question of situs, . . . is one of law based on a fully developed record in which there are no material factual disputes." Pet. App. 11a, 16a n.12 (emphasis added).

ing in *Harris* was expressly contingent on factors that are not present in this case, namely, that the obligee could sue the garnishees in any U.S. state where they are found to enforce their obligations (which the Congo could not do) and that each jurisdiction implicated in *Harris* was within the United States and bound by the full faith and credit clause of the U.S. Constitution (which does not reach the shores of the Congo). *Sturm* is no different from *Harris*, and inapposite for the same reasons. Af-Cap does not address the factors distinguishing this case from *Harris* and *Sturm*, nor the subsequent decisions of this Court that a state law rule placing the situs of intangible property in that state if the obligor can be found there does not apply where national foreign relations are implicated. *See United States v. Belmont*, 301 U.S. 324, 327, 331 (1937) (New York rule ascribing a New York situs to receivables from banks in New York cannot be applied if it interferes with the United States's compact with a foreign government); *United States v. Pink*, 315 U.S. 203, 231-32, 232 n.9 (1942) (same).

Equally flawed is Af-Cap's attempt to distinguish federal appellate decisions addressing the same legal question that is raised in this case—whether intangible property was "in the United States" or in a foreign state—on the ground that they do so for purposes of determining the applicability of the act of state doctrine rather than for applying § 1610(a) of the FSIA.[7] *See* Opp. at 8. Af-Cap ignores that this Court and others have routinely looked to act of state doctrine cases for guidance as to issues of foreign sovereign immunity (and vice versa). *See, e.g.*,

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[7] *See F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989) (Posner, J.); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968); *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985) and *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985).

First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) ("the policy considerations" underlying "the general principle of sovereign immunity. . . . are in large part also the underpinnings of the act of state doctrine" in that both "effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 623 n.11 (1983) (relying on act of state doctrine rationale of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) for preclusion of state laws to interpret the FSIA); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976) (notwithstanding differences between act of state doctrine and foreign sovereign immunity, "it cannot be gainsaid, however, that the proper application of each involves a balancing of the injury to our foreign policy . . . through judicial affronts to sovereign powers."). Af-Cap essentially concedes that if the Congo expropriated a party's right to oil in the Congo's territory, the property's situs would be the Congo, but cannot explain why the Congo's right to oil in the Congo should have a different situs under the FSIA. Because the situs is informed by the underlying foreign relations considerations necessitating the inquiry, *see* Pet. at 20, the standards applied for act of state doctrine purposes should not differ from those used to construe § 1610(a) of the FSIA.[8]

Af-Cap's further contention, that the situs determinations in act of state doctrine cases consider only "the asset side" and not the "debt side," is also meritless. A garnishee's obligation is, by definition, the obligee's asset: they are two sides of the same

[8] Af-Cap incorrectly attributes to Petitioners "a backdoor assertion that the act of state doctrine should govern." Opp. at 11. What Petitioners argued below and in the Petition is that in construing § 1610(a) of the FSIA, the court should apply the substantive federal law standards developed to determine situs of property and obligations in act of state doctrine cases.

coin. Each of the cases Af-Cap cited in fact discusses the intangible property as a "debt," and none suggests a distinction between the "asset side" and the "debt side." *See Farman-Farmaian*, 882 F.2d at 286; *Tabacalera*, 392 F. 2d at 714-16; *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F. 2d at 1137-38; and *Braka v. Bancomer, S.N.C.*, 762 F. 2d at 224. Rather, in each case the debt's situs depends on the foreign state's ability to execute the debt against property located within its territorial dominion (as the Congo has with regard to Garnishees' royalty oil obligations).

For this reason, Af-Cap's claim that Petitioners' argument would "repeal by implication § 1610" is completely unfounded. *See* Opp. at 13. Petitioners have never argued that a debt's situs is always at the location of the creditor. Instead, Petitioners advocate the application of the established federal law standard under which the situs of the debt is in the foreign state if the foreign state has control over the debt by virtue of its control over property located within its territorial dominion.[9] A bank account in the United States, or a letter of credit issued by a U.S. bank and payable to a foreign state at its bank account in the United States, would be intangible property in the United States under § 1610(a), notwithstanding the foreign location of the payee or owner of the account.

Thus, Af-Cap "cannot gain 'additional' rights merely by characterizing the same [intangible property] as a 'debt' rather than as an 'asset,'" and thereby "avoid an analysis of the location of [the property] **under the principles of sovereign immunity**." *Fid. Partners, Inc. v. Philippine Exp. & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1118 (S.D.N.Y. 1996) (emphasis added). The FSIA's provisions must "necessarily

[9] *Menendez v. Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), cited by Af-Cap further demonstrates the correct federal rule: it was not the location of the debtor that determined the debt's situs, but which jurisdiction "ha[d] the power to enforce or collect it." *Id.*

[be] informed both by international law principles and by articulated congressional policies" in enacting the FSIA. *Bancec*, 462 U.S. at 623. Garnishment is merely a procedural mechanism for the "attachment" of property that must yield to the federal policies of the FSIA. Domestic garnishment principles cannot inform the interpretation of the term "in the United States" in § 1610(a).

4. Petitioners Do Not Lack "Standing"

Af-Cap argues that Petitioners lack "standing" to petition for review because the 1984 loan agreement contains not only a waiver of the Congo's immunity, but also an agreement not to assert immunity that supposedly abrogates the mandatory provisions of the FSIA. *See* Opp. at 14-15. Every court to which Af-Cap has made this argument has rejected it because it contradicts that statute's plain text. Under the FSIA, attachment of a foreign state's property requires a court order that finds that the foreign state's property is "in the United States" and "used for a commercial activity in the United States," even where the foreign state has waived its immunity. 28 U.S.C. §§ 1610(a)(1), 1610(c).

Moreover, Af-Cap unsuccessfully made this argument to the district court in seeking to execute its money judgment against the Embassy of the Congo to the United States. *Af-Cap, Inc. v. Republic of Congo*, 326 F. Supp. 2d. 128, 129-30 (D.D.C. 2004). Af-Cap dismissed its appeal from the judgment, which held that the FSIA did not permit Af-Cap to attach the Embassy notwithstanding the provisions of the 1984 loan agreement, and Af-Cap is collaterally estopped from re-litigating this argument here.[10]

---

[10] The oil company Petitioners are not collaterally estopped from litigating the legal question in this Petition. *See* Opp. at 15-16. The prior *NUFI* litigation involved a situation in which the Congo chose to pay a particular judgment with the proceeds of royalty receivables. The case did not present

5. Af-Cap's Supplemental Brief Further Shows Why Certiorari Should Be Granted

Af-Cap's Supplemental Brief merely illustrates the extent and gravity of the Fifth Circuit's errors. Af-Cap argues the Petition should be dismissed or denied because of the Congo's violation of an order of the district court, which directed officials of the Congolese government to execute documents that "turn over" the Congo's royalty rights to Af-Cap, on the theory that the Fifth Circuit's ruling gave the district court control over the Congo's sovereign rights to its royalty share of oil in Congolese territory.[11] This order—which purports to reach into the Congo to divest rights to natural resources located there from a friendly foreign sovereign that owns and controls the oil—dramatically highlights the serious consequences already resulting from the Fifth Circuit's erroneous ruling that the situs of the Congo's royalty rights is "in the United States."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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the question of whether a court had the authority, over the Congo's objection, to interfere with the Congo's right to receive royalty oil in its own territory.

[11] The "fugitive disentitlement doctrine," under which Af-Cap argues the Petition should be dismissed, has no application here because the Congo has not been convicted of a criminal offense and then "fled." Likewise, the cases on which Af-Cap relies for this argument are clearly inapposite: *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954) involved an appeal from a conviction for criminal contempt, and *United States v. Crawford Enterprises, Inc.*, 643 F. Supp. 370 (S.D. Tex. 1986) involved a court's threat to dismiss a suit, which was voluntarily brought in a U.S. court by a foreign state-owned oil company, for violating procedural rules.

Respectfully submitted,

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March 22, 2005

(3)

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No. 04-1043

In The Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF AF-CAP, INC.

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Respondent Af-Cap, Inc. ("Af-Cap") recently learned of a new development in this case that should be brought to this Court's attention. On March 4, 2005, Af-Cap, a judgment creditor seeking to enforce a judgment for an undisputed debt owed by the Republic of Congo ("Congo"), filed an opposition to a petition for writ of certiorari jointly filed by the Congo and CMS Nomeco Congo Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. (collectively "CMS"). Four days later, on March 8, 2005, the Congo informed the district court judge that it would not obey the district court's order implementing the Fifth Circuit's decision that is the subject of the petition.[1] *See* Letter from Rodolphe Adada, Minister of Foreign Affaires and Francophony to Judge Sam Sparks, dated March 3, 2005. (A certified translation provided by the Congo is included in the Appendix to this brief). The Congo's refusal to comply with the lower court's order implementing the Fifth Circuit's opinion should deprive it of the right to pursue a writ of certiorari in this Court for the reasons that follow.

"Litigation entails reciprocal obligations: an appellant (or petitioner) who demands that the United States respect a favorable outcome must ensure that an adverse decision also can be carried out." *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir.), *reh'g denied*, 384 F.3d 916 (2004); *citing Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993); *Smith v. United States*, 94 U.S. 97 (1876). *See*

[1] The Congo sought a stay without bond from both the Fifth Circuit and the district court. Af-Cap did not oppose a stay so long as the Congo posted a supersedeas bond for the entire amount at issue, but the Congo declined to do so. Both the Fifth Circuit and the district court denied the stay. Neither the Congo nor CMS sought a stay from this Court. Instead, by the Congo's refusal to comply with a federal court order, they appear to have unilaterally granted themselves a stay.

also Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (dismissing the appeal of a criminal conviction when the defendant who sought review is a "fugitive from justice," finding that the defendant's escape "disentitles the defendant to call upon the resources of the Court for determination of his claims."); *Eisler v. United States*, 338 U.S. 189 (1949).

This Court and the lower federal courts consistently have applied the "fugitive disentitlement doctrine" in civil cases against defiant parties. *See National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43-44 (1954) (affirming the dismissal of an appeal from a money judgment by a petitioner who failed to deliver the specified property to the court's receiver and failed to file a supersedeas bond, by analogizing those circumstances to dismissals based on the removal of the subject matter from the jurisdiction of the court); *Collazos v. United States*, 368 F.2d 190, 197 (2d Cir. 2004) (and cases cited therein); *United States v. $129,374 in United States Currency*, 769 F.2d 583, 588 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986) (applying this "disentitlement doctrine" to civil cases); *Conforte v. Commissioner*, 692 F.2d 587, 589-90 (9th Cir. 1982) (holding that "disentitlement" is even more applicable in civil cases than criminal or quasi-criminal appeals because the appellant's liberty is not at issue and therefore "a fugitive from justice" was not entitled to engage the court's resources in a civil action related to his prior criminal conviction). *See also Ganem v. Ganem De Issa*, 269 So.2d 740 (Fla. Dist. Ct. App. 1972), *cert. denied*, 277 So.2d 284 (Fla.), *cert. denied*, 414 U.S. 1113 (1973). This remedy also has been applied in at least one case involving the Foreign Sovereign Immunities Act where, as here, a foreign government (or its instrumentality) ignored

a court order. *See United States v. Crawford Enterprises, Inc.*, 643 F.Supp. 370, 382 (S.D. Tex. 1986).

For these reasons, the joint petition for writ of certiorari filed by the Congo and CMS should be dismissed or denied.

Respectfully submitted,

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APPENDIX

MINISTER OF FOREIGN AFFAIRES
AND FRANCOPHONY

REPUBLIC OF CONGO
Unité – Travail – Progrès

CABINET

MAEF 0744, CAB.SP.

Brazzaville, 03 March 2005

MINISTER OF STATE

Re: Republic of Congo v. Af-Cap, Inc.

Dear Judge:

I refer to the order issued by this court on 22 February 2005 (the "Turnover Order"), which provides, *inter alia*:

- "The Court hereby takes possession and control of all future royalty obligations owed to the Congo under the Convention [for the production of oil and gas in the Congo dated May 25, 1979] and this Order shall constitute a judgment lien upon the Congo's property interests in, and its rights to receive payment of, its royalty share" from oil companies operating in the Congo under a concession granted by the Congo in the Convention;

- "The Court further orders the Congo to turn over such royalty payments into the registry of the Court and to execute . . . [a] letter of instruction . . . to the parties who pay royalties under the Convention to the Congo revoking prior instructions regarding payment of the royalty. . . ."

This suit was initiated over four years ago with a view to persuading United States courts to authorize seizure of

the Congo's rights to mining royalties, which it collects within its own territory, in satisfaction of a debt purchased by a creditor without any right to said mining royalties. The Congo has strongly objected to this litigation, which is unfounded. It is premised on the erroneous notion that an American court may transfer the right of a sovereign nation – the Republic of Congo – to dispose of its resources within its own borders. The Republic of Congo has thus far endeavored to cooperate with United States judicial authorities in the hope that United States courts would recognize their obligation to respect the Congo's sovereignty, as is mandated not only under Congolese and international law, but under United States law as well.

In light of the judgments of this Court and the Court of Appeals for the Fifth Circuit, the Congo is constrained to protest in the strongest possible terms the failure to respect its sovereign rights and the resulting judicial measures that purport to dispossess the Congo of economic rights comprising its national patrimony and principal source of export revenue. It is an established principle of the law of nations that every state exercises full and permanent sovereignty over its natural resources and exclusive authority to control the economic exploitation thereof. The Congo's rights to the mining royalties within its territory are subject to its exclusive jurisdiction and sovereignty, which cannot be subordinated to the judicial measures of another state.

The Turnover Order issued by this Court is a clear violation by the United States of international law which recognizes the right for any sovereign State to exercise authority and control over its natural resources within its national territory. Such actions impact negatively on the relations between the United States and the Congo, undermining the concerted mutual efforts of both nations

to encourage private United States entities to invest in the Congo, in particular in the oil sector. This unfortunate development requires the Congo to reassess its relations with the United States, particularly where other sources of trade and investment such as Canada, Europe, India and China continue to respect the sovereignty of the countries with which they maintain an economic relationship.

The Turnover Order is unenforceable in the Congo, and cannot supersede the Congo's sovereign authority to prescribe and enforce its own laws within its own territory. Regretfully, the Congo must hereby advise the Court that, for the reason stated, the Congo will not implement the Turnover Order.

Please accept, Your Honor, the expression of my most distinguished consideration.

[seal: Minister of Foreign Affaires and
Francophony
Cabinet
Republic of Congo]

[signature]

Rodolphe Adada

Hon. Sam Sparks
United States District Judge
United States District Court for
The Western District of Texas
Austin, Texas

U.S.A.

copy: Hon. William H. Taft, IV
United States Department of State

(5)

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No. 04-1043

In The Supreme Court of the United States

THE REPUBLIC OF CONGO,
CMS NOMECO CONGO INC., THE NUEVO
CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

vs.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF CHEVRONTEXACO CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST AND IDENTITY OF *AMICUS CURIAE*[1]

ChevronTexaco Corporation ("ChevronTexaco") as *amicus curiae* files this brief because it has a keen interest in the issues that petitioners have raised and seeks to bring to the Court's attention relevant matter not already set forth in the petition for writ of certiorari. This case involves an attempt in Texas by respondent Af-Cap, Inc. ("Af-Cap"), a foreign company, to execute on a judgment against petitioner the Republic of Congo (the "Congo") by garnishing the obligations of several domestic oil companies to furnish a royalty share of oil to the Congo. Based on that same judgment, Af-Cap is also pursuing similar enforcement of judgment efforts in other United States courts to garnish the obligations of other companies to furnish oil royalties to the Congo. Af-Cap's efforts include actions in the United States District Court for the Northern District of California in which Af-Cap seeks to garnish similar obligations of subsidiaries or affiliates of ChevronTexaco. Thus, ChevronTexaco has an immediate interest in the issues raised in the petition for writ of certiorari.

Apart from its immediate interest in the California action, ChevronTexaco also has a substantial general interest in the resolution of the important Foreign Sovereign Immunities Act (FSIA) question raised in the petition. Subsidiaries or affiliates of ChevronTexaco are active in

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[1] All parties have consented in writing to the filing of this brief. The consent letters are submitted with *amicus curiae*'s proof of service.

Pursuant to Rule 37.6, *amicus curiae* states that no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus curiae* authored the brief.

more than 180 nations and have entered into a wide array of ventures with foreign sovereigns to explore or develop the oil, gas or other mineral resources within those nations. They have invested more than $5 billion in African projects alone. They likewise are involved in ventures in the Pacific Rim, Eurasia, the Middle East, Latin America, the Carribean, Europe and North America. Through these ventures, subsidiaries or affiliates ChevronTexaco owe substantial oil, gas or other royalties to many sovereign nations that have sizeable unrelated debts. Much of this unrelated debt is in default and subject to acquisition for a small fraction of the face value and accumulated interest.

The Fifth Circuit's interpretation of the FSIA below threatens to embroil ChevronTexaco and numerous other American companies involved in overseas ventures in protracted and costly efforts by creditors holding sovereign debt to garnish the obligations of American companies to sovereign nations. This result will substantially and adversely impact American companies in their efforts to develop foreign mineral resources and will subject them to burdensome and intrusive litigation to collect debts to which they are strangers. For this reason as well, ChevronTexaco, and all other companies involved in ventures with foreign nations, have a profound interest in the proper resolution of the FSIA question raised in the petition.

ChevronTexaco does not in this brief repeat petitioners' well-reasoned analysis of the Fifth Circuit decision and the problems created thereby. It submits this *amicus brief* solely to provide the court with some additional context that further illustrates the exceptional importance of the question presented.

THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

A. The Fifth Circuit's Holding Will Disadvantage American Companies In Competing For Overseas Development Projects, Will Burden Those Companies With Costly and Intrusive Garnishment Litigation And Will Impair Foreign Relations

Until 1952, the United States generally granted foreign sovereigns absolute immunity from the jurisdiction of American courts, including complete immunity from execution. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Currently, the FSIA permits execution on a foreign sovereign's property only if, among other things, the sovereign's property is "in the United States" *and* is "used for commercial activity in the United States." *See Connecticut Bank Of Commerce v. The Republic Of Congo*, 309 F.3d 240, 247 (5th Cir. 2002); App. 53a. The Fifth Circuit below held that with respect to an intangible debt owed to a sovereign, the "in the United States" prong may be satisfied whenever *the debtor* – as distinct from the development activity giving rise to the debt – is located in the United States. This holding places American companies at a substantial disadvantage in competing with foreign companies in the quest for overseas oil, gas and mineral investment opportunities that are vital to the economy of our country.

The Fifth Circuit's holding exposes foreign sovereigns to the risk that any obligation that any American company owes to the sovereign – even if generated by development efforts that occur entirely within the sovereign's territorial jurisdiction – could be attached in the United States to

satisfy unrelated debts to foreign creditors, like Af-Cap. Given the size of their debts, many foreign nations will have a powerful incentive to limit or curtail their dealings with American companies in ways that will harm the competitiveness of American companies and impair the foreign relations of the United States.

After all, for the Congo and many other developing countries, oil or other mineral resources are the primary source of revenue in otherwise challenged economies. *E.g.*, Background Note: Angola, U.S. Dep't of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/6619.htm; Background Note: Republic of Congo, U.S. Dep't of State, Bureau of African Affairs, http://www.state.gov/r/pa/ei/bgn/2825.htm. Sound management of oil and mineral revenues is essential "to ensure that these revenues are successfully converted into social capital and lead to broader-based overall economic development and poverty reduction for the country as a whole." Oil & Gas Sector Issues and Policy: Social & Economic Impact, The World Bank Group, http:www.worldbank.org/ogmc/wbogpolicysocioeconomic.

For developing countries like the Congo that have substantial debts, a rule that permitted foreign creditors to use American courts to seize oil or mineral royalties owed by American companies could drain revenue that is critical to meet these nations' current needs and could undermine their efforts to work with the International Monetary Fund and World Bank for a long term debt solution. Worse still, this siphoning would not occur through a thoughtfully planned process but rather through haphazard litigation brought by any creditor that is able to convert a past debt into a judgment, often by default.

Faced with these risks, developing countries likely will seek to curtail or limit their dealings with companies located in the United States in favor of either state-run enterprises or companies from countries who afford broader immunity from execution. In either scenario, American companies will lose – not because they cannot deliver capital and technical expertise on terms that match or beat their competitors but instead because of the Fifth Circuit's interpretation below.

In addition to creating an incentive for foreign nations to discriminate against American companies, the lower court's holding also injects unnecessary friction into the dealings between foreign nations and American companies. Although the holding below enables creditors of foreign sovereigns to garnish royalty obligations owed by American companies, the opinion does not protect the American garnishees from being forced to pay those royalty obligations twice – once to the garnishor and again to the sovereign. The opinion permits American courts to exercise jurisdiction over the garnishor's claims, but there is no guarantee that these garnishments will be recognized by the sovereign or in any foreign tribunal that has jurisdiction over claims between the garnishee and the sovereign. Nor is it clear whether or under what circumstances an American court would have jurisdiction over the latter claims. Thus, the opinion creates an unacceptable risk that American companies will be forced involuntarily to pay debts to which they are a complete stranger merely because they entered into unrelated development agreements with the debtor sovereign.

Moreover, the garnishment litigation permitted under the holding below would be burdensome and intrusive for the American garnishees. Under the correct FSIA rule,

efforts to garnish obligations that arose from activities occurring within a foreign sovereign's territorial jurisdiction would be barred at their inception because the FSIA's requirement that the garnished property be "in the United States" should be interpreted in a manner comparable to the situs definitions in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985) and *F. & H.R. Faman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989).

But under the Fifth Circuit's rule, even obligations arising from activities occurring entirely overseas would satisfy the FSIA's situs requirement as long as the obligor is an American company. For American garnishees, this would effectively write the "in the United States" requirement out of the FSIA and would permit every garnishment action against an American company to proceed to an inquiry solely as to whether the foreign sovereign used its royalty right "for a commercial purpose in the United States."

Litigation to determine the "situs" and "used for" prongs of the sovereign immunity exception under FSIA typically entails costly and intrusive discovery into the sensitive business affairs of the garnishee and its relationship with the sovereign. Even when the sovereign is directly involved in the enforcement of judgment proceedings, courts will often require that the garnishor first pursue discovery from the garnishee. The garnishor typically will demand, among other things, the production of all documents concerning the historical, current and prospective (i) obligations of the garnishee to the sovereign; (ii) agreements and transactions between the garnishee and the sovereign; (iii) exploration and production

of oil and other hydrocarbons; (iv) oil field operations and reserves; (v) lifting and marketing of oil; (vi) investment decisions and communications with other investors; (vii) internal and external negotiations concerning new projects and modifications to existing agreements; (viii) project financing and capital calls; (ix) bank and accounting records; (x) tax returns, management and internal operations of garnishee; (xi) discharge of any obligations to the sovereign including the bank accounts used by the sovereign; (xii) use of any oil proceeds by the sovereign; (xiii) information about the corporate structure and relationships among affiliated garnishees; (xiv) information about any contacts that might subject the garnishee to jurisdiction in the United States or result in alter ego liability of an upstream domestic affiliate of the garnishee, and (xv) deposition testimony from any and all witnesses that may be able to shed light on any of these issues.

In the Northern California action alone, which included three separate proceedings, the ChevronTexaco garnishees incurred almost 3,000 attorney hours over three years at substantial expense in responding to Af-Cap's garnishment efforts. The burden is staggering when one considers that the ChevronTexaco garnishees were strangers to the debt on which Af-Cap sought to execute. This burden on strangers to the underlying debt is even more intolerable when one further considers the intrusion into the garnishees' affairs. The garnishees are forced to open their books and reveal how they are conducting their overseas ventures, what deals they were able to strike with the foreign sovereign, how they pay their obligations, and how they structure their relationships with corporate affiliates.

Given that these garnishees have no connection to the underlying debt, these burdens and this intrusion are troubling. But the harm inflicted on the United States companies is particularly hard to fathom because it arrives after the fact through a court decision that adopts a novel and unusual definition of the controlling statutory language. Prior to the Fifth Circuit's opinion below, an American company would not have expected that by merely entering into a development agreement with a foreign nation, it would be condemned to protracted garnishment litigation in the United States based on debts to which the company was a stranger. Yet now, after countless companies have entered into such agreements, they face the specter of potentially limitless garnishment litigation over debts to which they were not a party.

Some of the statistical data involving foreign debt provides a stark indication of the flood of garnishment litigation that could be released by the lower court's holding. The International Monetary Fund and World Bank estimates that it will cost $54.5 billion to assist 37 Heavily Indebted Poor Countries to reach program goals for debt reduction.[2] If the cost simply to reduce the debt to manageable levels is $54.5 billion, the underlying debts that could form the basis for garnishment actions are massive.

The potential for garnishment chaos is further inflamed by the incentive that the decision below creates for

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[2] International Monetary Fund And International Dev't Association, Heavily Indebted Poor Countries (HIPC) Initiative: Status of Implementation, IMF & World Bank (Aug. 20, 2004) at 13, http://siteresources.worldbank.org/INTDEBTDEPT/PublicationsAndReports/20264190/HIPC-status-Of-Implem.pdf.

creditors to acquire foreign debts and race to American courthouses to execute on them. A debt that previously might have been the subject of global, internationally supported voluntary debt restructuring negotiations suddenly has the potential to be satisfied involuntarily if the creditor can find an American company who is obliged to the debtor sovereign and beats all other competing creditors to the courthouse door. These races to an American courthouse will result in the substantial consumption of American judicial resources in order to supervise the payment of debts arising entirely in other nations.

Moreover, under the opinion below, the potential burden of protracted garnishment litigation could discourage American companies from pursuing ventures with foreign nations, particularly when added to the high economic and political risks that otherwise apply to such projects in all events. In short, although development of oil and other natural resources overseas is vital to the United States' economic and security interests, the holding below creates incentives for both foreign sovereigns and American companies alike to decline to pursue such opportunities with the other.

The holding below also threatens this country's foreign policy in at least two other ways. The United States has been an active participant in the efforts of the international community to help heavily indebted nations reduce their debts to manageable levels. Our courts should not be the vehicle for a creditor end run on this important foreign policy.

Moreover, by giving other nations an incentive to discriminate against American companies in providing access to mineral resources, the holding below could

trigger retaliatory discriminatory measures by this country against either the discriminating foreign sovereigns or the countries who receive preferences. The United States policy of encouraging free trade and cooperative ventures with other nations would thereby be undermined.

In short, the holding below may harm the competitiveness of American companies, impair United States foreign policy and hinder invaluable development projects worldwide in myriad other ways.

B. Given The Substantial Adverse Impacts Of The Fifth Circuit's Holding, The Fact That Its Holding Conflicts With This Court's Precedents And Decisions Of Other Circuits, And The Lack Of Any Precedent To Support The Fifth Circuit's Analysis, The Court Should Grant The Petition For Writ Of Certiorari

Given the substantial adverse impacts of an erroneous holding, it is essential that our courts adopt the correct interpretation of the FSIA's situs requirement. Since petitioners have demonstrated the errors in the Fifth Circuit's analysis, ChevronTexaco only underscores three key points here.

First, the Fifth Circuit's holding conflicts with that of other circuits that have determined the situs of intangible property in cases involving a foreign state or implicating international relations. *See Braka*, 762 F.2d at 224-25 (2d Cir. 1985); *F. & H.R. Faman-Farmaian Consulting Eng'rs Firm*, 882 F.2d at 286-87 (7th Cir. 1989); *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985).

Second, the lower's courts holding also deviates from this Court's precedent in multiple ways. *See* Petition at 12-19.

Third, the Fifth Circuit relied on a case that determined the situs of a debt obligation purely for purposes of a state law question and that did not involve the interests of a foreign sovereign or implicate international relations. App. 19a, *citing Harris v. Balk*, 198 U.S. 215 (1905). That case has no application here, where federal and international interests plainly are at stake.

At a minimum, these and the other points that petitioners have made provide substantial grounds to question the Fifth Circuit's holding on a question that is of the utmost importance. To settle that important question, the Court should grant the petition for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

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